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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 363

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, ET AL., *Petitioners,*

v.

NATIONAL MEDIATION BOARD, ET AL., INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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August 1, 1968

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes, et al,[1] pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in consolidated Cases Nos. 21620, 21622 and 21623 on June 28, 1968.

[1] Petitioners include the individual employees who were plaintiffs in the actions in the District Court.

OPINIONS BELOW

The Findings of Fact and Conclusions of Law of the United States District Court for the District of Columbia, entered on January 22, 1968, in Civil Actions Nos. 2853-67 and 2854-67, are unreported and are printed in Appendices B and C hereto, *infra,* pages 9a and 27a. The opinion of the Court of Appeals, entered June 28, 1968, is unreported and is printed in Appendix D hereto, *infra,* page 36a.

JURISDICTION

The judgment of the Court of Appeals was entered on June 28, 1968, and is reproduced as Appendix E hereto, *infra,* page 52a. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

In the opinion of petitioners, this petition presents the following questions:

1. Is the jurisdiction of a Federal district court to review actions of the National Mediation Board in representation disputes before the Board under Section 2, Ninth, of the Railway Labor Act limited only to those actions involving instances of constitutional dimension or gross violations of the statute by the Board?

2. Does a Federal district court have jurisdiction to review the issue of whether the Mediation Board has complied with its statutory duty to investigate a representation dispute where the Board has refused to make findings and act upon challenges to ballots cast in a mail ballot representation election raising, *inter alia,* substantial questions of fraud, violations of

Federal Postal regulations, and the validity of ballots cast for a representative who cannot legally serve?

3. Does a Federal district court have jurisdiction to review the issue of whether the National Mediation Board has statutory authority in a representation dispute to attempt to decertify an incumbent union by requiring that its name appear on the ballot in a representation election or abandon any claim to represent the employees involved; the issue of whether the Board's regulations authorize such action; and the further issue of whether the Board can take such action other than by a rule of general applicability?

4. Does a Federal district court have jurisdiction to review the issue of whether the National Mediation Board has violated its long established regulations and its statutory duty in refusing to dismiss a representation application where, at the time of a challenge to the existence of a valid representation dispute, changes in the composition of the craft or class of employees involved by way of hiring and turnover make it a physical impossibility for there to be compliance with the Board's regulations?

STATUTES, RULES AND REGULATIONS INVOLVED

This litigation involves Title 28 of the United States Code, Sections 1331, 1332, 1337, and 2201; Section 10 of the Administrative Procedure Act, as amended (5 U.S.C.A., Section 702); Sections 2, Fourth, and 2, Ninth, of the Railway Labor Act (45 U.S.C.A., Sections 152, Fourth, and 152, Ninth); Sections 1202.3, 1202.5, 1203.2, 1206.2, 1206.3, and 1206.4 of the Rules of the National Mediation Board, Title 29, Code of Federal Regulations, Chapter X, 13 F.R. 8740; and Part 332, sub-

paragraph 4 of the Post Office Department Manual. These provisions are reproduced in Appendix A hereto, *infra*, page 1a.

STATEMENT

The Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes ("Clerks") was certified on May 16, 1946, by the National Mediation Board as the duly authorized representative for the purposes of the Railway Labor Act (45 U.S.C.A., Section 151, et seq.), of the clerical, office, and related employees of Pan American World Airways, Inc. The Clerks have represented such employees continuously from that date and represent them at the present time (R. 185, 186).[2] On August 6, 1965, the International Brotherhood of Teamsters filed an application with the Mediation Board, pursuant to Section 2, Ninth of the Railway Labor Act (45 U.S.C.A., Section 152, Ninth), to investigate an alleged representation dispute among the employees of Pan American involved and to certify the Teamsters as the duly designated representative of such employees. This application was docketed by the Mediation Board as Case No. R-3781.

A mail ballot election was conducted by the Board between August 8, 1966, and September 7, 1966, on the Teamsters application. The Clerks, without objection from the Board or the Teamsters, elected to omit its name from the ballot in this election so that it would be necessary for there to be cast for the Teamsters,

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[2] Reference is to pages of certified joint appendix in Court of Appeals.

along with any write-in votes that might be cast for other representatives, at least 50% plus one of the votes of eligible employees to change the certification on Pan American. If the Clerks name had appeared on the ballot, the Teamsters could have received the certification with as little as 25% plus one of the ballots counted, provided more than 50% of the eligible employees voted (R. 187).

During the course of this first election, fraudulent letters bearing the forged names of Mr. George Meany, President of the AFL-CIO, and Mr. C. L. Dennis, President of the Clerks, and written on forged letterheads of the two organizations, were sent to the Pan American employees involved advising the employees that the Clerks name had been omitted from the ballot inadvertently and that a write-in campaign was being conducted on behalf of the Clerks. Officers and representatives of the Clerks immediately filed sworn affidavits with the Mediation Board to the effect that the Clerks were not involved in the forgery (R. 188). The Teamsters have never done this. The filing of a false affidavit would subject the individuals involved to criminal penalties under Federal statutes.[3] On October 6, 1966, on petition of the Clerks, the election was set

[3] It was not until January 2, 1968, that an affidavit was finally filed in the District Court on this subject by the Teamsters in support of a motion for reconsideration of the ruling of the District Court granting the motion of the Clerks et al. for a preliminary injunction (R. 202-206). This affidavit was a thinly disguised effort to beef up the Teamsters position on appeal. It was filed 18 months after the fact by an individual not an officer of the Teamsters and simply denies personal responsibility for the fraud. It is a far cry from the immediate and unequivocal affidavits submitted to the Mediation Board by the Clerks president and principal representatives and serves to underscore the Teamsters reluctance to do likewise.

aside by the Board and a new election ordered to be conducted in November, 1966. However, the Board did not tell the employees that it was acting because of the fraud involved, but issued a bland generalized statement concerning the "atmosphere" surrounding the election (R. 69). Subsequently, the Board circulated to the employees a statement which failed to make clear that the Clerks were not responsible for the fraud and misleading the employees to the effect that the Clerks had committed some fault (R. 8, 41, 188).

The Clerks objected to the immediate rescheduling of a second election on the grounds that coming so soon it would necessarily be influenced by and tainted by the fraud committed in the first election, as well as the Board's failure to candidly inform the employees of the reasons for invalidating the first election and its misleading information to the employees. The Board rejected the objections. The Clerks filed suit in the District Court to enjoin the second election (Civil Action No. 3013-66). In an opinion dated November 30, 1966, United States District Judge Holtzoff expressed the view that the Clerks position had a great deal of merit, but ruled that the Court could not interfere because of the limited nature of judicial review of Board actions (R. 9, 188). The District Court, therefore, dismissed the complaint of the Clerks for lack of jurisdiction of the subject matter (R. 189).

The Clerks appealed the decision and asked the Court of Appeals to stay the second election pending disposition of the appeal (Case No. 20606). The Court of Appeals denied the stay in a majority opinion and a concurring opinion, dated December 16, 1966 (*Brotherhood of Railway & Steamship Clerks* v. *National Mediation Board, et al.*, 374 F. 2d 269). The majority opin-

ion agreed with the District Court's view of the merit of the Clerks position. It criticized the Board for its lack of candor and its inept handling of the matter, including its failure to properly advise the employees involved as well as its misinformation to such employees indicating some fault of the Clerks. It found that "It will not do to say that both candidates have been accused of wrong when the fact is that one has been indicted for murder, and the other has only received a parking ticket." At the same time, the Court expressed the view that it could not then intervene, particularly in the form of the extraordinary remedy of a stay, and in light of the availability of effective relief if the second election, in fact, were stained by fraud. It cited, *inter alia,* the fact that counsel for the Board had asserted that the Board had authority to provide such relief even though the ballots had been counted. The concurring opinion read in pertinent part as follows (374 F. 2d at 275, 276):

> "I agree that our jurisdiction is narrow and limited but I cannot quite agree that the Board's action falls short of calling for our intervention by means of a stay of governmental action. The Board's curative efforts here were extraordinarily feeble when considered alongside the blatant fraud and forgery by persons advocating the cause of the Teamsters Union. The Board's complacency has a clear tendency to encourage the shocking conduct which it purports to chide. If such tactics succeed, the victory of the Teamsters will be the fruit of gross fraud, forgery and chicanery. Except for the adjective 'gross', which I think valid, it seems to me we all agree on the vice of the conduct complained of.
>
> "I refrain from recording a dissent only because of the likelihood that Appellants may take steps to set aside the election, should it be adverse to them."

The second election was also a mail ballot election. The ballot was the same as that used in the first election. The name of the Clerks did not appear on such ballot and neither the Board nor the Teamsters objected. The ballots were counted in New York City, December 27, 1966, through December 30, 1966. The Mediator's report to the Board recorded a total of 3,517 ballots of which the Teamsters received 3,091. The report showed that 6,936 employees of Pan American were eligible to participate. Thus, 48 more ballots were recorded than were necessary to certificate the Teamsters in place of the Clerks to represent the employees involved (R. 10, 11, 190, 191). The fraud the Clerks feared appeared, as well as other facts affecting the integrity of the election.

The Clerks therefore challenged the validity of 1,178 ballots on the grounds that (1) 137 ballots were in the form of write-in votes for the Clerks clearly induced by the fraud which had permeated the election and contained designations urged to be used for such write-ins in the fraudulent documents circulated among the employees; (2) 757 ballots were also products of fraud and other violations of Federal law because they were in unpostmarked envelopes, which could not have gone through the mails because the regulations of the Post Office Department required the postmarking of such envelopes,[4] and these appeared only after all ballots

[4] This was substantiated by an opinion from Mr. Timothy J. May, General Counsel of the Post Office Department, citing Part 332 of the Postal Manual, which required that such envelopes be postmarked if they had gone through the mails and further stating that the percentage of envelopes not postmarked as to the total, i.e. in excess of 20%, is "believed to be extremely in excess of the percentage which may be expected to occur" by inadvertence (R. 46, 47).

had been removed from the custody of the Post Office in New York in violation of the rules of the election; and (3) 284 write-in ballots were cast for the Transport Workers Union after Mr. David Cole, the Impartial Umpire under the provisions of the AFL-CIO Constitution, had ruled that TWU could not legally seek representation of the employees involved under the prohibitions of that Constitution and such decision had been affirmed by the AFL-CIO Executive Council (R. 33, 34, 44-47, 48, 49).

Any one of the three serious and substantial challenges affecting the honesty and integrity of the election was sufficient to require dismissal of the Teamsters application under the Board's established interpretation and application of the Railway Labor Act. *Brotherhood of Railway Clerks* v. *Association for the Benefit of Non-Contract Employees,* 380 U.S. 650, at page 669 (footnote 5).[5] The Clerks, therefore, requested dismissal of the Teamsters application. The Teamsters attempted to increase the number of valid votes and thus provide themselves with a cushion by an appeal, asserting that approximately 84 ballots not counted for various reasons should have been counted. The Teamsters appeal did not challenge the omission of the Clerks name from the ballot in the second election (R. 42, 191).

Although the integrity of its proceedings was involved, the Board did nothing for seven months. Finally, on September 12, 1967, the Board released another of its vague findings, which have become a hallmark of its action in NMB Case No. R-3781, sidestepping the issues (R. 18-25) The Board, in the language

[5] The Board's past applications of this rule appear at pages 151-153 of the record.

of the Court of Appeals (41a), "did not rule on any of these contentions". It said that "no useful purpose would be served" by such findings and once again took refuge in a vague reference to "the whole congeries of facts" (R. 22).

The bulk of the Board's findings was devoted to an issue not before the Mediation Board, i.e. the absence of the Clerks name from the ballot. The Board held that its action in not requiring the Clerks name to appear on the ballot in the first two elections was contrary to an alleged long established interpretation and application of the Railway Labor Act to which it was now returning. The Board therefore ruled that it was holding a third representation election on Pan American and that the Clerks name must be on the ballot or the Clerks must relinquish its right to represent the employees involved (R. 23-25). This finding was factually and legally incorrect (the Board's standing policy was just the opposite, i.e. it had always permitted an incumbent union to remain off the ballot when it so desired (R. 54-56)) and was made with respect to an issue not before the Mediation Board and an issue upon which the Clerks had had no opportunity to be heard.

The Clerks promptly filed a petition for reconsideration on September 21, 1967 (R. 149-170). The petition asked the Board to make findings on the issues before it and to dismiss the Teamsters application.

The Clerks separately petitioned the Board to dismiss the Teamsters application on the ground that a valid representation dispute does not now exist because changes in the size and composition of the craft or class of Pan American employees involved make clear the Board could not have before it sufficient employee authorization cards to support the Teamsters applica-

tion (R. 50-53, 167, 168). Section 2, Fourth, of the Railway Labor Act (45 U.S.C.A., Section 152, Fourth), provides that a majority of any craft or class shall have the right to determine who shall be the representative of the craft or class for purposes of the statute. In implementation of this statutory requirement, Section 1206.2 of the Board's rules governing the handling of representation disputes (R. 50 A) requires that a representation application be supported by approved authorization cards from at least a majority of the craft or class involved. At the time the representation application was originally filed by the Teamsters, the craft or class of employees involved embraced 6,936 employees. Thus, under the statute and implementing rules, the Teamsters were required to then have on file with the Board approved authorization cards covering at least 3,469 employees. The size of the craft or class is now substantially greater. Pan American figures released in September 1967 show that it now numbers some 8,000 employees (R. 51, 52). Moreover, by then there had been a substantial turnover of at least 2,448 employees in the craft or class. This means that of the original craft or class of 6,936 employees, only 4,488 employees remained from whom the Board would have to have in excess of 4,000 authorization cards or about 90%, a practical impossibility, for there to be a valid representation election under the Board's regulations (R. 52). By now, there would be even less of the original group employed by Pan American. The Board has heretofore applied its rules so as to dismiss representation applications in such circumstances (R. 52, 53).[6]

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[6] Case No. R-2160, dated March 15, 1950, in which the Board dismissed a representation application on the ground that turnover since filing the application invalidated it (R. 52, 53).

On October 24, 1967, the Board issued a decision reaffirming its original action (R. 13, 26-30, 192). In this decision, the Board still refused to pass upon the issues raised by the Clerks. It made no findings with respect to the validity of the ballots the Clerks contended were induced by fraud, with respect to the validity of the unpostmarked ballots, or with respect to the validity of the write-in ballots for the Transport Workers Union (R. 13, 26-30, 192).

With respect to its efforts to decertify the Clerks if its name did not go on the ballot in a third election, the Board tacitly admitted it was in error in its findings of September 12, 1967, and now attempted to justify its action (R. 28) on the ground that such action was required by the decision in *Brotherhood of Railway and Steamship Clerks* v. *Association for the Benefit of Non-Contract Employees,* 380 U.S. 650 (1965).

Thereafter, the Board assigned a Mediator to conduct an investigation leading up to a third representation election. The Board denied the request of the Clerks that this investigation be scheduled so as not to conflict with the representation investigation in NMB Case No. R-3947 on the property of Braniff International Airways also involving the Clerks and Teamsters in order that the Clerks designated representatives, particularly the Director of its Air Transport Division, could participate in both (R. 193, 194).

The Board also applied its decertification ruling to NMB Case No. R-3947, then pending before it, which involved a Teamsters application to take over the certification of clerical, office, and related employees of Braniff International Airways, which the Clerks had continuously represented since April 5, 1948 (R. 257). As indicated above, the Board also scheduled its re-

sumed investigation in the Braniff case, over the objections of the Clerks, to conflict with the Pan American case (R. 193, 194).

The Clerks, along with interested Pan American and Braniff employees, filed suit in the District Court in two separate cases for declaratory and injunctive relief against the Board. The complaint in Civil Action No. 2853-67, involving Pan American (R. 5-16), alleged that (1) the Board had violated its statutory duty to "investigate" the dispute as well as its own established interpretation and application of the Railway Labor Act and its own regulations by refusing to pass on the ballot challenges which would lead to dismissal of the Teamsters application; (2) the Board had no statutory power to attempt to decertify the Clerks as it sought to do, its regulations did not provide such a requirement, and the requirement was improperly adopted as an *ad hoc* action directed at the Clerks rather than as a general rule; and (3) the Board had acted in a grossly arbitrary and highhanded manner in unnecessarily scheduling the two representation investigations at conflicting times so as to exclude the Clerks chosen representatives from one or the other. The complaint in Civil Action No. 2854-67, involving Braniff (R. 220-227), contained allegations (2) and (3) in the Pan American complaint. In each case, the Clerks et al. prayed for a preliminary injunction to bar holding of the representation elections pending a decision on the complaint (R. 31, 229).

The Board moved to dismiss each complaint or grant it summary judgment (R. 179, 239). The Teamsters, an intervenor in Civil Action No. 2853-67, did likewise with respect to the complaint in that case (R. 180). The District Court denied the motions of the Board and

the Teamsters and granted the Clerks et al. a preliminary injunction in each case (R. 183-197; 253-261). The District Court's Conclusions of Law in Civil Action No. 2853-67 (substantially the same as those in Civil Action No. 2854-67) read as follows (R. 195, 196):

> "1. The complaint raises substantial issues as to whether the Board has acted within its statutory authority under Section 2, Ninth, of the Railway Labor Act, in its actions enumerated above or has exceeded that authority, and as to whether the Board has acted in conformity with its own promulgated rules and regulations. It also raises substantial issues as to whether the Board has complied with the requirements of Section 2, Ninth, and of due process that it conduct a fair and impartial investigation of the representation dispute in NMB Case No. R-3781.
>
> "2. The plaintiffs are entitled to a trial and final determination of these issues on the merits. The Court has jurisdiction to entertain the complaint and render a final determination on the issues raised therein under Title 28 of the United States Code, Sections 1331, 1332, 1337, and 2201, and Section 10 of the Administrative Procedure Act, as amended (5 U.S.C., Section 701).
>
> "3. The plaintiffs have exhausted all administrative remedies available to them. Unless enjoined by this Court, the Board will proceed to conduct a third representation election in NMB Case No. R-3781 in accordance with its decisions of September 12, 1967, and October 24, 1967.
>
> "4. The conduct of a third representation election in NMB Case No. R-3781, prior to a final determination of the merits of the complaint, will result in irreparable injury to plaintiffs. The Court has also given consideration to the arguments of the defendants and of the intervening de-

fendant that the public interest and the interest of other parties require a denial of plaintiffs' motion for a preliminary injunction and concludes that they do not outweigh the irreparable injury which will result to the plaintiffs if a third election is conducted under the facts found above prior to a final determination of the merits of the complaint.

"5. There is sufficient probability that the plaintiffs will prevail upon the merits of one or more of the issues raised by the complaint herein to warrant this Court granting the plaintiffs' motion for a preliminary injunction."

On appeal, the Court of Appeals held that there was no jurisdiction in the District Court to entertain the complaints (p. 36a). The Court expressed "uneasiness" about the Board's intentions with respect to the "name on the ballot" issue, declared that it found "unsettling" and "unfair" to the Clerks the Board's actions, and that the Board's "Alphonse-Gaston interplay" was disquieting. However, the Court found it must put aside its disquietude because there could be judicial review of Mediation Board actions in representation matters only in "instances of constitutional dimension or *gross violation of the statute.*" (Emphasis supplied.) The Court of Appeals therefore concluded that the complaints should be dismissed.[7]

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[7] The Court of Appeals, by order dated July 11, 1968, stayed the issuance of its opinion and judgment to the District Court until August 5, 1968, pending the filing of a petition for a writ of certiorari with this Court to review such judgment and, if such petition be filed, thereafter until final disposition by this Court. On July 17, 1968, Mr. Justice Black denied a Teamsters motion to vacate the stay.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals in the present case conflicts with the decisions of this Court, as well as numerous decisions of other Federal courts, with respect to jurisdiction of Federal courts to review actions of the Mediation Board. In the present case, the Court of Appeals held that there can be no judicial review of actions of the Mediation Board except in "instances of constitutional dimension or gross violation of the statute", i.e. the Railway Labor Act, and it was against this standard that the complaints here involved were measured (p. 36a). Any plain, ordinary, everyday violation of the statute by this Federal agency cannot be reviewed by the courts. There must be a violation so obvious on its face that it can be characterized as a "gross violation". However, that is not what this Court and other Federal courts have said in the leading cases dealing with the Mediation Board.

In the most recent of these decisions, *Brotherhood of Railway Clerks* v. *Association for the Benefit of Non-Contract Employees,* 380 U.S. 650 (1965), this Court reviewed its decision in *Switchmen's Union* v. *National Mediation Board,* 320 U.S. 297, which involved a suit to cancel a certificate issued by the Board in a representation case, and described that decision as one in which the courts refused to consider the merits of a claim as to whether the Board could divide crafts or classes of a single carrier into smaller units for collective bargaining purposes because Congress had committed such decisions to the Board and the dispute was to reach its last terminal point when the administrative finding was made. With these principles in mind, this Court in the *ABNE* case further held that one of the statutory duties of the Board was to "investigate" repre-

sentation disputes and then proceeded to decide on the merits "whether the Board's reaffirmation of the R-1706 determination in these cases was made after a sufficient investigation, within the meaning of the Act": (p. 665). This Court concluded (p. 668) that the Board had performed its statutory duty and the substance of its determination was, therefore, not subject to judicial review.

This line of demarcation has been generally followed by the Federal courts, including the Court of Appeals. *WES Chapter, Flight Engineers' International Association* v. *National Mediation Board, et al.*, 314 F. 2d 234 (D.C. Cir., 1962); *UNA Chapter, Flight Engineers' International Association* v. *National Mediation Board, et al.*, 294 F. 2d 905 (D.C. Cir., 1961); *Airline Stewards and Stewardesses Association* v. *National Mediation Board, et al.*, 294 F. 2d 911 (D.C. Cir., 1961), *cert. den.* 369 U.S. 810; *Decker, et al.* v. *Linea Aeropostal Venezolana, et al.*, 258 F. 2d 153 (D.C. Cir., 1958); *Airline Dispatchers Association, et al.* v. *National Mediation Board, et al.*, 189 F. 2d 685 (D.C. Cir., 1951), *cert. den.* 342 U.S. 849; *United Transport Service Employees of America, et al.* v. *National Mediation Board, et al.*, 179 F. 2d 446 (D.C. Cir., 1949); *United Transport Service Employees of America, et al.* v. *National Mediation Board, et al.*, 141 F. 2d 724 (D.C. Cir., 1944); *National Federation of Railway Workers, et al.* v. *National Mediation Board, et al.*, 141 F. 2d 725 (D.C. Cir., 1944); *Brotherhood of Railway and Steamship Clerks, Etc.* v. *Atlantic Coast Line R. Co.*, 201 F. 2d 36 (4th Cir., 1953); *Rose, et al.* v. *Brotherhood of Railway and Steamship Clerks*, 181 F. 2d 944 (4th Cir., 1950); *Locomotive Engineers* v. *National Mediation Board*, 68 LRRM 2103, decided by the District Court for the

District of Columbia on April 26, 1968, in which appeal is now pending.[8]

The line drawn by these cases is a far cry from saying, as the Court of Appeals does in the present case, that there must be either a constitutional violation or a "gross statutory violation". This Court in *ABNE* was not reviewing, based on *Switchmen's Union,* any claim of "gross violation of the statute." It was reviewing whether the Board had conducted a "sufficient investigation" in making the determination and that inquiry depended essentially upon whether the Board should have granted United Air Lines a hearing on its claim that the craft or class should be split.

The complaints of the Clerks et al. in the District Court in the present situation do not ask the courts to go nearly so far. They raise the essential questions of whether the Board has met its statutory duty to conduct a sufficient investigation within the meaning of the Act; whether the Board has exceeded its statutory powers; and whether the Board has ignored its own rules. These issues are more substantial in terms of Mediation Board compliance with the statute and its rules than the issue of the procedures followed by the Board in making the craft or class determination, the sufficiency of which this Court reviewed in *ABNE.*

Moreover, in refusing to rule on the Clerks challenges to the second election, the Board removed itself from the protective embrace of *Switchmen's Union* since it did not make the administrative finding which this Court stated in that case was to serve as the "last

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[8] Reference is to Labor Relations Reference Manual.

terminal point". It refused to do so without any reason therefor.

2. The decision of the Court of Appeals raises substantial Federal questions which with respect to the application of the Railway Labor Act should be reviewed by this Court.

This decision makes abundantly clear that almost unlimited confusion surrounds the subject of judicial review of Mediation Board actions. The Court found as "unsettling" and "unfair" the Board's reliance on alleged confusion caused by the Clerks failure to appear on the ballot in the Pan American case, since this amounted to disadvantaging the Clerks for the reprehensible acts of other persons (p. 47a). The Court also found "unsettling" the Board's view "that the Supreme Court gives it no choice but to continue its present ballot, with an on-the-ballot policy," because it found that different balloting procedures might have different impacts on the stability of representation and that the Board had considered none of these (pp. 47a, 48a). Finally, the Court expressed as "disturbing" the situation confronting it in the following finding (pp. 48a-49a):

> "The choice of what policy to follow is essentially for the Board to make. It is, however, for that very reason disturbing that on the one hand the courts refuse to involve themselves deeply in the substance of these questions, emphasizing the nearly unlimited powers of the Board, while on the other, the Board is heard to protest that its answers are mandated by the need for application of dictum in judicial opinion. This Alphonse-Gaston interplay is disquieting, with all due allowance for the possibility that the Board has given full consideration to the considerable problems, and uses court precedent as a palliative against pressures rather than as a prime mover of Board action."

However, the Court finally concluded that it "must put aside the kinds of disquietude that we have sketched in deference to the doctrine of *Switchmen's Union*" which it interpreted as requiring a case of "gross violation of the statute" as a condition precedent to judicial review (p. 50a). Thus, the Court brought into play for the first time a standard not set forth in any of the decisions of this Court on the subject. It stated that the application of any such standard does not involve the application of legal concepts of jurisdiction but an exercise "in practicalities", involving, *inter alia,* "a peek at the merits". Thus, we are no longer dealing with legal concepts but a "rule of law" governed by practicalities influenced by "peeks" without the benefit of any full consideration and findings by the lower court. Such a doctrine is fraught with confusion. It creates a new standard between some sort of indefinite non-gross statutory violation and an equally indefinite "gross violation". This excursion into the unknown of something less than gross violations, which the Board is free to commit no matter how disturbing to a court's sense of statutory meaning and fair play is to be governed not by judicial rules but by practicalities. If this is the law, then the statute should clearly be amended. But first this Court should say it is the law.

This decision also creates a standard for judicial review of Mediation Board actions unknown to the law. The concept that an agency may violate its statutory duty with impunity and outside the pale of judicial restraint so long as it keeps such violations within the boundaries of a non-gross violation raises issues of importance in the administration of the Railway Labor Act and with obvious implications for administrative agencies generally. The ever continuing growth of air

transportation with the ever increasing responsibility of the Board for the stability of that industry require that the Board perform within the statute and not within some gray area of statutory violations not amounting to gross violations thereof. The failures of this agency have already provoked crises in rail and air transportation and required special legislation for compulsory arbitration. If any Federal agency ever needed the hand of judicial restraint upon its actions, the Mediation Board does.

3. The Court of Appeals decision raises a basic question of due process to litigants and the encouragement of administrative irresponsibility.

The Clerks et al. find themselves in the strange position that the Federal courts who have considered the Clerks problems with the Board in the present dispute have, on the one hand, found the Clerks position to be meritorious, and have roundly criticized the Board in the four different opinions or findings issued in this matter, stating, *inter alia,* that the Board was guilty of blandness and complacency even in the face of blatant fraud and forgery; that its actions encouraged such fraud; that the Board's actions were unsettling and unfair and the cause for disquietude and concern, while at the same time the Clerks have been unable to even get the Board to pass upon its challenges because the Board's defiance of the statute and its own regulations is said to fall short of a gross statutory violation. Moreover, this conclusion is reached only by the application of a vague standard of "practicalities" applied through the procedure of a "peek" at the merits.

It is respectfully submitted that this concept embodies a basic unfairness to a litigant in the position of the Clerks et al. as fully attested to by the situation in which they find themselves. If "gross violations" are

to be the measuring rod to be considered in terms of "practicalities", then the Clerks et al. are entitled to a determination made only on the basis of a full record.

In addition, it is submitted that this concept can only encourage administrative irresponsibility by the Board. This Court does not now have before it an agency which in the *ABNE* case this Court commented (page 671) had provided fair and effective procedures nor one which has lived up to the expressed expectations of the Court that it would continue to do so. After being plainly invited by the District Court and the Court of Appeals, in the litigation concerning the fairness of its holding of the second election, to back up and take another look, the Board insisted upon going ahead. When it was then confronted with the consequences of its actions in the form of substantial issues involving fraud and violations of Federal postal regulations, *inter alia,* it refused to face up to these unpleasant problems and acted in a way strongly suggesting that it simply looked for a way out. The Board thus no longer comes before this Court in the garment of fairness and impartiality that it did in the *ABNE* case, but in a tattered garment around the edges of which swirl actions of fraud and other violations of Federal law or regulations committed in its proceedings in derogation of the honesty and integrity of those proceedings, about which it has done nothing effective and with respect to which it even refuses to come to grips by passing on the issues before it. Given the rule of law propounded by the Court of Appeals in the present litgation, it can only be reasonably expected that this process of administrative irresponsiblity will be encouraged and grow worse. The Board does not even have to worry any more about whether it is violating the statute, but only about whether its violation is suf-

ficiently gross to invoke judicial interference. To say the least, it is doubtful that Congress would ever confer such unbridled power on any Federal agency, much less on one with the enormous power wielded by the Board whose stewardship has been brought into question by the facts shown on the records of the litigation of the last two years.

4. The complaints in the District Court raised substantial issues as to the Board's compliance with statutory requirements which should be decided only on the basis of a full trial in the District Court by any standard, including that of gross statutory violations.

A. Issue Relating to the Board's Failure To Perform Its Duties To Properly Investigate by Making Findings on Challenges to the Validity of Ballots

The Clerks objected to the second election in NMB Case No. R-3781 on the grounds that such election would be influenced by the fraud committed in the first election. Both the District Court and the Court of Appeals believed that there was substantial merit to the Clerks objections but resolved a close question of jurisdiction by permitting the second election to proceed with the clear understanding and upon the express representation of the Board counsel that there were corrective meassures available to the Clerks before the Board if its fears proved to be correct. The second election raised a substantial issue as to whether votes to invalidate the election and require dismissal of the Teamsters application had been induced by fraud (R. 41-44). The Clerks, therefore, used the avenue for correction which the Board had represented to the Court of Appeals was available with respect to the impact of the fraud upon the second election. The facts

available and presented to the Board (R. 41-44) clearly raised a substantial issue. If the 137 ballots were induced by fraud, they should have been invalidated by the Board. *Kearney & Trecker Corp.* v. *National Labor Relations Board,* 210 F. 2d 852 (7th Cir., 1952), *cert. den.* 348 U.S. 824.

The Clerks challenges also raised substantial issues with respect to the validity of unpostmarked ballots that did not comply with Federal law. The only evidence that these ballots had been mailed by individuals through the mails in accordance with the Board's regulations, rather than placed among the valid ballots in some other fashion,[9] was the Federal postmark. The Mediator validated these ballots solely on the grounds that since they were franked mail they did not require a postmark. This ruling was contrary to Federal Postal regulations, the correct interpretation and application of which were supported by an opinion of the General Counsel of the Post Office Department. Here, again, a sufficient number of ballots were involved to invalidate the election and require dismissal of the Teamsters application (R. 44-47).

Finally, the Clerks raised a substantial issue as to the validity of write-in ballots for TWU, which could not legally serve (R. 48-49). This was raised both because (1) the Board itself had a ground rule that such ballots were invalid, which was applied in this case to other ballots (R. 49), and (2) Federal courts have held that a union determined to be ineligible to represent employees pursuant to an arbitration cannot *participate* in a representation election. *United Textile*

[9] The ballots were outside of the custody of the Post Office for a substantial period.

Workers of America v. *Textile Workers Union of America,* 258 F. 2d 743 (7th Cir., 1958); *International Brotherhood of Firemen and Oilers* v. *International Association of Machinists,* 338 F. 2d 176 (5th Cir., 1964).

The least that the Clerks had a right to expect under the Board's statutory duty to properly investigate the representation dispute before it was that it would consider and act upon these challenges. As the Court of Appeals has found (p. 41a), it refused to do so.

The Court of Appeals opinion (p. 42a), without the benefit of a full trial on the merits, concludes that the investigatory requirements of the Board authorized it to refuse to pass upon the challenges. It is respectfully submitted that the issues raised are, as the District Court found, substantial, entitling the Clerks et al. to a trial in the District Court on the merits.

B. The Issue of the Board's Statutory Authority To Require the Clerks Name To Go on the Ballot or To Abandon Representation Rights

In the first two elections in Case No. R-3781 involving Pan American the Clerks elected to omit its name from the election ballot. Neither the Mediation Board nor the Teamsters objected to this election and the Clerks name did not appear on the ballot. Neither the Board nor the Teamsters at that time advanced any contention to either the District Court or the Court of Appeals that the Clerks election was not entirely proper and the exercise of a statutory right. However, when the Board issued its decision of September 12, 1967, it ruled that in a third representation election on the property of Pan American the Clerks name must appear on the ballot or the Clerks must abandon any

claim to represent the employees involved. This ruling was based upon the Board's erroneous finding that it had a long established interpretation and application of the statute requiring an incumbent union's name to be on a representation ballot which it had not previously applied in NMB Case No. R-3781 and to which it was now returning (R. 23-25). The Board's action was taken without any claim or issue before it with respect to the omission of the Clerks name from the ballots in the previous two elections.

In its decision of October 24, 1967, the Mediation Board reaffirmed its action and also applied this action to the representation proceedings in NMB Case No. R-3947 on the property of Braniff (R. 26-30). The Board was forced to recede from its reliance upon the erroneous interpretation and application of the statute previously cited by it for the basis of its action and rely upon a claim that the *ABNE* decision *required* it to take the action that it did (R. 28, 29).

The complaints in both cases in the District Court alleged that this action of the Board exceeded its statutory authority, violated its statutory duty to conduct fair and impartial investigations in representation disputes, violated its own rules, and was contrary to the requirements of due process. The District Court held that it had jurisdiction to entertain these complaints and render a decision on the merits (R. 195, 259).

The Court of Appeals found that the Board action was not *required* by the decision in the *ABNE* case, but that the Board was *authorized* to take the action. At the same time, the Court expressed substantial concern about the Board's handling of the problem pp. 45a-49a).

It is respectfully submitted that the *ABNE* case does not authorize the Board to attempt a decertification of an incumbent union as is attempted in this case. This proposed ruling of the Board is not a matter of the form or control of the ballot. It is a substantive ruling and must be based upon the Board's statutory authority. Unlike the National Labor Relations Act, which gives the NLRB authority to decertify, the Railway Labor Act confers no such authority on the Mediation Board. However, it makes no difference whether the Board was authorized or was not authorized to take the action. After it was demonstrated to the Board that it erred with respect to its finding of past policy, the Board stated that the reasons for its action were that under the *ABNE* case "the Board has little discretion to adopt any other course" (R. 29). The Court of Appeals, on the other hand, found that the Board had discretion to fashion a different ballot. Consequently, at the very least this important issue should be remanded to the Board for a decision based upon the exercise of such discretion and not upon the erroneous assumption by the Board that it is, in substance, required to so act by the *ABNE* decision.

C. The Issue of the Board's Refusal To Apply Its Regulations to Determine the Present Existence of a Representation Dispute

It is uncontroverted that changes in the composition of the craft or class of employees involved on Pan American since 1965 have been such that the Board does not now have before it and cannot have before it the number of authorization cards on behalf of the Teamsters to give rise under its own regulations to a valid representation dispute (R. 50-53). It however refused to apply those regulations to the present chal-

lenge on the grounds that there were sufficient cards three years ago, in spite of the fact that this has been its past practice and procedure (R. 52, 53). The District Court found that this issue was one with respect to which the Clerks et al. were entitled to a trial on the merits. The Court of Appeals, following its concept of "gross violation", found insufficient basis for judicial review. It is respectfully submitted that the District Court was correct.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 1, 1968

APPENDIX

APPENDIX A

STATUTES, RULES AND REGULATIONS INVOLVED

28 U.S.C., Section 1331:

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

28 U.S.C., Section 1332:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or coun-

terclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: *Provided further,* That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal business.

(d) The word "States", as used in this section, included the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 U.S.C., Section 1337:

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

28 U.S.C., Section 2201:

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

5 U.S.C., Section 702:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

Section 2, Fourth of Railway Labor Act
45 U.S.C., Section 152, Fourth:

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided,* That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in th ebusiness of a labor organization.

Section 2. Ninth of the Railway Labor Act 45 U.S.C., Section 152, Ninth:

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated, the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

NATIONAL MEDIATION BOARD RULES AND REGULATIONS

11 F.R. 177A-922. Redesignated 13 F.R. 8740
Title 29, Code of Federal Regulations, Chapter X

Section 1202.3:

Representation disputes. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of the Railway Labor Act, it is the duty of the Board, upon request of either party to the dispute, to investigate such dispute and certify to both parties, in writing, the name or names of individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and to certify the same to the carrier.

Section 1202.5:

Rules to govern elections. In the conduct of a representation election, the Board shall designate who may participate in the election, which may include a public hearing on craft or class, and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within 10 days designate the employees who may participate in the election.

Section 1203.2:

Investigation of representation disputes. Applications for the services of the National Mediation Board under section 2, Ninth, of the Railway Labor Act to investigate representation disputes among carriers employees may be made on printed forms N. M. B. 3 copies of which may be secured from the Board's Secretary. Such applications and all correspondence connected therewith should be filed in duplicate and the applications should be accompanied by signed authorization cards from at least a majority of the employees composing the craft or class involved in the

dispute. The applications should show specifically the name or description of the craft or class of employees involved, the name of the invoking organization, the name of the organization currently representing the employees, if any, the estimated number of employees in each craft or class involved, and the number of sgined authorizations submitted from employees in each craft or class. The applications should be signed by the chief executive of the invoking organization, or the authorized officer of the organization. These disputes are given docket numbers in series "R".

Section 1206.2:

Percentage of valid authorizations required to determine existence of a representation dispute. (a) Where the employees involved in a representation dispute are represented by an individual or labor organization, either local or national in scope, and are covered by a valid existing contract between such representatives and the carrier, a showing of proved authorizations (checked and verified as to date, signature, and employment status) from at least a majority of the craft or class must be made before the National Mediation Board will authorize an election or otherwise determine the representation desires of the employees under the provisions of section 2, Ninth, of the Railway Labor Act.

(b) Where the employees involved in a representation dispute are unrepresented, a showing of proved authorizations from at least thirty-five (35) per cent of the employees in the craft or class must be made before the National Mediation Board will authorize an election or otherwise determine the representation desires of the employees under the provisions of section 2, Ninth, of the Railway Labor Act.

Section 1206.3:

Age of authorization cards. Authorizations must be signed and dated in the employee's own handwriting or witnessed mark. No authorizations will be accepted by the National Mediation Board in any employee representation dispute which bear a date prior to one year before the date of the application for the investigation of such dispute.

Section 1206.4:

Time limit on applications. (a) The National Mediation Board will not accept an application for the investigation of a representation dispute for a period of two (2) years from the date of a certification covering the same craft or class of employees on the same carrier in which a representative was certified, except in unusual or extraordinary circumstances.

(b) Except in unusual or extraordinary circumstances, the National Mediation Board will not accept for investigation under section 2, Ninth, of the Railway Labor Act an application for its services covering a craft or class of employees on a carrier for a period of one (1) year after the date on which:

(1) An election among the same craft or class on the same carrier has been conducted and no certification was issued account less than a majority of eligible voters participated in the election; or

(2) A docketed representation dispute among the same craft or class on the same carrier has been dismissed by the Board account no dispute existed as defined in § 1206.2 (Rule 2); or

(3) The applicant has withdrawn an application covering the same craft or class on the same carrier which has been formally docketed for investigation.

Part 332. Subparagraph 4 of Post Office Department Manual:

.46 MATTER NOT TO BE POSTMARKED. The following are not to be postmarked:

a. Metered mail, except metered registered mail (see 361.114), metered reply letters and cards (see 143.5) and mail with wrong date in meter stamp (see 324.366), and except individual loose metered letters in collection mail when their separation would delay the facing operation of stamped letters. If excessive volumes of loose metered letters are due to faulty preparation, see 324.363.

b. Official bulk mailings of other Government agencies without postage stamps affixed, unless sender requests that mail be postmarked. Official bulk circular mailings of the post office may also be distributed without postmark.

c. Domestic second-class matter mailed by publishers or news agents without stamps affixed.

d. Second-class matter mailed by publishers or news agents addressed to foreign countries to which domestic regulations apply.

e. Precanceled postal cards, except when their separation would delay the facing operation of stamped letters and cards, and ordinary mail bearing precanceled stamps.

f. Permit imprint mail.

g. Plain slips of paper submitted by the public for philatelic or other purposes.

APPENDIX B

District Court's Findings of Fact and Conclusions of Law in Civil Action No. 2853-67

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2853-67

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, 1015 Vine Street, Cincinnati, Ohio

and

JACK WATTS, 413 Lark Avenue, Miami Springs, Florida

CLEM LAYRITZ, 508 Bayswater, Burlingame, California

O. STOWBUENKO-SAITSCHENKO, 466 Oakland Avenue, Cedarhurst, Long Island, New York

JAMES VARNADOR, 342 Honeysuckle Lane, Melbourne, Florida

WALTER R. WILLIAMSON, 4816 S. 36th St., Arlington, Va.

WILLIAM J. MILO, 42 Trinity Place, Hewlett, Long Island, New York

HARRY HIGBY, 321 Morris Avenue, Inwood, Long Island, New York

BEVERLY FIELDS, 1885 Park Street, Apt. 6, Atlantic Beach, Long Island, New York

Plaintiffs

v.

NATIONAL MEDIATION BOARD and FRANCIS A. O'NEILL, JR., LEVERETT EDWARDS, HOWARD G. GAMSER, Individually and as Members of the National Mediation Board, 1230 - 16th Street, N. W., Washington, D. C., *Defendants,*

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Intervening Defendant.*

ORDER GRANTING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AND DENYING THE MOTION OF DEFENDANTS TO DISMISS THE ACTION OR IN THE ALTERNATIVE GRANT DEFENDANTS SUMMARY JUDGMENT AND THE MOTION OF THE INTERVENING DEFENDANT TO DISMISS THE COMPLAINT

This cause came on to be heard by the Court on December 19, 1967, on the following motions:

(1). The motion of the plaintiffs, filed on November 6, 1967, for a preliminary injunction to prohibit the National Mediation Board, its individual members, and any employee or agent thereof, from conducting a third representation election among employees of Pan American World Airways, Inc., in a proceeding before the Board identified as NMB Case No. R-3781, pending final determination by the Court of the complaint for declaratory and injunctive relief against the Board and its members, individually and as members of the Board, also filed on November 6, 1967;

(2). The motion of the defendants, filed on November 30, 1967, to dismiss the action or in the alternative to grant defendants summary judgment on the ground that the Court lacks jurisdiction over the subject matter of the action;

(3). The motion of the intervening defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, filed December 13, 1967, to dismiss the complaint on the following grounds:

(a). The Court lacks jurisdiction over the subject matter.

(b). Plaintiffs are not entitled to injunctive relief for the reason that the action taken by the National Mediation Board here does not exceed its delegated powers, is not

contrary to any specific prohibition in the Act, does not violate any Constitutional rights of plaintiffs, and plaintiffs have failed to show that the Board has failed to perform any statutory duty imposed upon it by the Act.

The Court having considered the following documents filed in support of and in opposition to the above enumerated motions:

(1). The verified complaint; plaintiffs' motion for a preliminary injunction; the affidavit of James L. Highsaw, Jr., and attachment thereto and the plaintiffs' memorandum in support of the motion;

(2). Defendants' motion to dismiss the action or in the alternative grant defendants summary judgment; the affidavit of Thomas A. Tracy, Executive Secretary of the Board, with exhibits in support of said motion; defendants' "Statement of Material Facts As To Which There Is No Genuine Issue"; defendants' opposition to plaintiffs' motion for a preliminary injunction; defendants' memorandum in support of their motion to dismiss or in the alternative for summary judgment and in opposition to plaintiffs' motion for a preliminary injunction; defendants' supplemental memorandum in support of defendants' opposition to plaintiffs' motion for a preliminary injunction and in support of defendants' motion to dismiss or in the alternative for summary judgment;

(3). The motion of the intervening defendant International Brotherhood of Teamsters to dismiss the complaint; the intervening defendant's memorandum of points and authorities in support of its motion to dismiss the complaint;

(4). The answer of plaintiffs in opposition to defendants' motion to dismiss or in the alternative for summary judgment; plaintiffs' answer in opposition to the motion of the intervening defendant to dismiss the complaint; plaintiffs' reply to defendants' opposition to plaintiffs' motion for a preliminary injunction; plaintiffs' reply to opposition of

the intervening defendant to plaintiffs' motion for a preliminary injunction; and

The Court having heard argument from the parties in open court in support of and in opposition to said motion, makes the following findings of fact and conclusions of law:

Findings of Fact

1. The plaintiff Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes (hereinafter called "Clerks") is an unincor-Employees (hereinafter called "Clerks") is an unincorporated association representing railroad and airline employees. The Clerks were certified on May 16, 1946, by the National Mediation Board as the duly authorized representative for the purpose of the Railway Labor Act (45 U.S.C., § 151 et seq.) of the clerical, office, and selected employees of Pan American World Airways, Inc. The Clerks have represented such employees continuously from that date and represent them at the present time. There are presently approximately 8,000 employees in the craft and class of Pan American employees represented by the Clerks. There has also been in existence continuously since November 22, 1946, a collective bargaining agreement between Pan American and the Clerks governing the rates of pay, rules, and working conditions of that air carrier's employees represented by the Clerks. The present agreement became effective on January 1, 1966, and is currently in force.

(Verified Complaint, para. 4; Appendix "A" to Exhibit A to Complaint, page 1; Defendants' Statement of Uncontested Facts, page 1)

2. The individual plaintiffs are employees of Pan American, are listed on the appropriate seniority rosters provided for by the collective bargaining agreement between the Clerks and that air carrier, and have been determined

by the National Mediation Board to be eligible to participate in the representation dispute which gives rise to the present complaint.

(Verified Complaint, para. 5; Defendants' Statement of Uncontested Facts, para. 2)

3. The defendant National Mediation Board is an independent agency of the Executive Branch of the United States government, created by the provisions of Section 4, First, of the Railway Labor Act (45 U.S.C.A., Section 154, First), for the purpose of carrying out the duties and obligations imposed upon the Board by such statute. The individual defendants, Messrs. Francis A. O'Neill, Jr., Leverett Edwards, and Howard G. Gamser, comprise the membership of the Mediation Board. Among the duties imposed upon the Board by the Railway Labor Act are those set forth in Section 2, Ninth, of the statute (45 U.S.C., Section 152, Ninth), to investigate disputes as to who are the representatives of carriers subject to that statute, to determine the duly designated and authorized representative of such carriers for the purpose of the Railway Labor Act of such employees, and to certify such representatives to the employer carrier. The principal office of defendant National Mediation Board and of the individual defendants is located at 1230—16th Street, N.W., Washington, D.C. Air carriers, including Pan American, are subject to the Act.

(Verified Complaint, para. 7)

4. The intervening defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter called "Teamsters") is a labor organization representing various groups of employees in various industries, including railroad and airline employees.

(Motion to Intervene)

5. On August 6, 1965, the Teamsters filed an application with the Board pursuant to Section 2, Ninth, of the Rail-

way Labor Act to investigate an alleged representation dispute among the clerical, office, and related employees of Pan American World Airways and to certify the Teamsters as the duly designated representative of such employees for the purposes of the Railway Labor Act. This application was docketed by the Board as NMB Case No. R-3781. Two representation elections have been conducted on the property of Pan American pursuant to the application, both of which have been invalidated by the Board. The Board now proposes to hold a third representation election which has given rise to the present complaint.

(Verified Complaint, para. 8; Defendants' Statement of Uncontested Facts, para. 3; Tracy Affidavit, paras. 1 and 2; Exhibit "A" to the Complaint; Tracy affidavit, para. 36)

6. The first representation election was a mail ballot election conducted between August 8, 1966, and September 7, 1966. The Clerks elected to omit its name from the ballot in this election. The Teamsters made no objection to the omission of the Clerks name from the ballot. The ballot had the Teamsters name on it and a place for an employee to write-in the name of any desired representative. Under the circumstances, it became necessary for the Teamsters, along with any write-in votes that might be cast, to obtain 50% plus one votes from eligible employees to change the certification on Pan American. If the Clerks name had appeared on the ballot, the Teamsters could have received the certification with 25% plus two of the ballots counted provided more than 50% of the eligible employees voted.

(Verified Complaint, para. 9; Defendants' Statement of Uncontested Facts, para. 3; Tracy affidavit, paras. 21-23; *Aeronautical Radio, Inc.* v. *Mediation Board,* 380 F.2d, 624, *cert. den.,* 19 L.Ed. 2d 259)

7. During the course of this first election, fraud was committed in the form of letters under the forged name of Mr. George Meany, President of AFL-CIO, and Mr. C. L.

Dennis, President of the Clerks, written on forged letterheads of the two organizations, which were sent to the Pan American employees involved in envelopes with forged letterheads, advising the employees that the Clerks name had been omitted from the ballot inadvertently and that a write-in campaign was being conducted on behalf of the Clerks. Officers and representatives of the Clerks immediately filed sworn affidavits with the Board to the effect that the Clerks were not involved in the forgery. As a result of the fraud, the ballots received by the Board were impounded. On October 6, 1966, the election was set aside by the Board and a new election ordered to be conducted in November, 1966.

(Verified Complaint, para. 10; Appendix "A" of Exhibit "A" to Complaint; Defendants' Statement of Uncontested Facts, paras. 4 and 5; Tracy affidavit, paras. 24-36)

8. The Clerks objected to the immediate scheduling of a second election on the grounds that coming so soon it would necessarily be influenced by and tainted by the fraud committed in the first election. The Board rejected the objection. The Clerks filed suit in this Court on or about November 8, 1966, to enjoin the second election (Civil Action No. 3013-66). In an opinion dated November 30, 1966, United States District Judge Holtzoff expressed the view that the Clerks position was meritorious, but ruled that the Court could not interfere because of the limited nature of judicial review of Board actions. The opinion read, in pertinent part, as follows:

> "THE COURT: The Court is of the opinion that there is a great deal of merit as a matter of justice in the contentions of the plaintiffs. The Court is further of the opinion that the Board might have been well advised to have postponed the second election until the effect of the fraud committed during the first election campaign has been forgotten. But this Court has no power to substitute itself for the Board or review the discretion of the Board, and this matter was entirely within the discretion of the Board.

"The power of the Court to review orders of the National Mediation Board in conducting an election is strictly limited by the case of Switchmen's Union v. National Mediation Board, 320 U.S. 297, which was only recently reaffirmed by the Supreme Court in Brotherhood of Railway and Steamship Clerks v. Association For The Benefit of Non-Contract Employees, 380 U.S. 650."

The District Court, therefore, dismissed the complaint for lack of jurisdiction of the subject matter.

(Verified Complaint, para. 11; Appendix "A" to Exhibit "A" to Complaint; The Board's Findings and Order of September 12, 1967; Defendants' Statement of Uncontested Facts, para. 5; Tracy affidavit, para. 46, Exhibit 43)

9. The Clerks appealed the decision and asked the Court of Appeals to stay the election pending disposition of the appeal (Case No. 20,606). The Court of Appeals denied the stay in a majority opinion and concurring opinion on December 16, 1966. The majority opinion (Circuit Judges Leventhal and Fahy) agreed with the District Court's view of the merit of the Clerks position and its conclusion as to the unavailability at that time of judicial relief, particularly in the form of the extraordinary remedy of a stay. The majority opinion read in pertinent part as follows:

"In his oral opinion the District Judge noted that he found a great deal of merit in the Clerks' contention that the delay was too short to forget the message of the forged letters, but that the court was without power to substitute its view for that of the Board. We share his concern and we share his conclusions. The questions involved here are of the kind committed by the Railway Labor Act to the Mediation Board and not the courts. The Board may rightly have assigned weight to the employees' interest in representation by a union of their own choice, and at the earliest feasible time. Although the record does suggest that the Board has not been sufficiently concerned with the importance of doing its utmost to scrape away all stain of the fraud, we hesitate to conclude that the Board's action

was so gross as to invest the court with jurisdiction. We are a shade more hesitant to intrude since the matter is before us on injunctive relief rather than the merits, and granting of stay traditionally calls for a determination that there is a 'probability' that applicants will be successful on the merits. *Virginia Petroleum Jobbers Association* v. *Federal Power Commission,* 104 U.S. App. D.C. 106, 259 F.2d 921 (1958)."

The concurring opinion (Circuit Judge Burger) read in pertinent part as follows:

"I agree that our jurisdiction is narrow and limited but I cannot quite agree that the Board's action falls short of calling for our intervention by means of a stay of governmental action. The Board's curative efforts here were extraordinarily feeble when considered alongside the blatant fraud and forgery by persons advocating the cause of the Teamsters Union. The Board's complacency has a clear tendency to encourage the shocking conduct which it purports to chide. If such tactics succeed, the victory of the Teamsters will be the fruit of gross fraud, forgery and chicanery. Except for the adjective 'gross', which I think valid, it seems to me we all agree on the vice of conduct complained of."

(Verified Complaint, para. 12; Appendix "A" of Exhibit "A" to the Complaint; Tracy affidavit, para. 47)

10. The Court of Appeals also spoke of the possibility of corrective relief if the second election were, in fact, stained by fraud. On this point, the majority opinion stated in pertinent part as follows:

"A stay pending appeal is always an extraordinary remedy, and it is no less so when extraordinary jurisdiction must be asserted as a prerequisite. This is offset to some extent by the practical consideration that in a case like this the application for a stay is often the battle and more than a mere skirmish. On the other hand there is at least a possibility that if the second election is stained, due to the persisting

impact of the forgery and/or of confusion engendered by the Board's letter, corrective relief may be available."

That Court also cited in footnote 4 the following representations of Board counsel:

"However, it should be noted that in response to a question at argument Board counsel asserted that if developments lead the Board to conclude the second election was tainted by fraud, it has authority to set aside the election even though the ballots have been counted."

The concurring opinion further stated that "I refrain from recording a dissent only because of the likelihood that Appellants may take steps to set aside the election, should it be adverse to them."

(Verified Complaint, para. 13; Appendix "A" to Exhibit "A" of the Complaint)

11. The second election was also a mail ballot election. The ballot was the same as that used in the first election. The name of the Clerks did not appear on such ballot and the Teamsters did not object thereto. The ballots were counted in New York City beginning December 27, 1966, and concluded on December 30, 1966. The Mediators' report to the Board recorded the following ballots:

Teamsters	3091
Other Organizations or individuals	426
Void Ballots	39
Total	3,556

The report also showed that 6,936 employees of Pan American were eligible to participate. Thus, 48 more ballots were necessary to certificate the Teamsters if all such ballots were valid.

(Verified Complaint, para. 14; Tracy affidavit, paras. 52-56, Exhibits 24-26)

12. The recorded ballots included 137 write-in votes for the Clerks; 284 write-in votes for the Transport Workers Union; and, 757 unpostmarked ballots. All of these ballots were recorded by the Mediator over the protest of the Clerks. The Mediator also refused to impound the contested ballots and envelopes until the Clerks could appeal the Mediator's rulings to the Board.

(Verified Complaint, para. 14 and para. 15; Exhibit "A" to the Complaint, page 3, footnote 1)

13. Rule 4 of the Board's rules of the election provided for an appeal to the Board from the Mediator's decisions and his interpretation and application of the rules governing the election. The Clerks filed such an appeal which was perfected on January 30, 1967, and supplemented on February 10, 1967. This appeal included a challenge to some 1,178 ballots recorded by the Mediator as follows:

1. The Clerks challenged 137 write-in votes for the Clerks on the ground that such votes had clearly been induced by the fraudulent letters and thus were clearly tainted and that under the decisions in the court litigation referred to above, the Clerks were entitled to have these votes declared invalid.

2. The Clerks challenged 757 votes removed from unpostmarked envelopes on the ground that postal regulations required the postmarking of such envelopes; that in the absence of such postmark they were illegal ballots in a "mail" election; that the only evidence of marking was the postmark, particularly since the ballots had been removed from the custody of the Post Office for a two-week period prior to counting without notice to the Clerks and without an observer from the Clerks present, contrary to the ground rules established for the election. This challenge was supported by copies of the Post Office Department regulations and an opinion of the General Counsel of the Post Office, interpreting those regulations as requiring postmarking individually mailed franked envelopes such as were here involved.

3. The Clerks challenged 284 write-in votes for the Transport Workers Union on the ground that such organization could not legally serve as a representative because of the binding effect of the AFL-CIO Constitution prohibiting raiding by a member organization and the ruling of Arbitrator David Cole, affirmed by the AFL-CIO Executive Council, that the Transport Workers Union was prohibited by such constitution from so serving.

The Teamsters attempted to increase the number of valid votes by an appeal asserting that approximately 84 ballots not counted for various reasons should have been counted (Exhibit "A" to complaint).

(Verified Complaint, paras. 14-16; Tracy affidavit, paras. 57-60; Appendix A to Exhibit "A" to the Complaint)

14. The Board issued its Findings and Order on the appeals on September 12, 1967. In this decision, the Board made the following statement with regard to the issues posed by the appeals:

> "The Board has carefully reviewed each of these points raised by the respective organizations and finds that no useful purpose would be served by an item by item discussion of the merits of these objections. It is our view that several of these objections are peripheral and without merit, but in reaching our determination, it is incumbent upon us to inspect the whole congeries of facts alleged and incidents complained of concerning the course of the second election and make an assessment based thereon."

The Board set aside the second election and directed that a third election be held. It also directed that the Clerks name must appear on the ballot in this third election unless the Clerks notified the Board that it was abandoning its representation rights.

(Verified Complaint, para. 16; Exhibit "A" to Complaint; Tracy affidavit, para. 62, Exhibit 27)

15. On September 21, 1967, the Clerks petitioned the Board for reconsideration of its Findings and Order of September 12, 1967. This petition alleged that the Board erred in not dismissing the Teamster application following the Clerks appeal of January 30, 1967, because as a matter of law insufficient valid votes were cast; that the Board erred in not making findings with respect to each of the bases of the appeal because the right of appeal under the Board's rules was otherwise destroyed and such findings were required as a matter of law; that the failure of the Board to act upon and make findings with respect to the portion of the appeal involving the 137 write-in votes the Clerks contended were induced by fraud violated the representation made by the Board to the Court of Appeals in Case No. 20,606, and totally negated the understanding expressed in that Court's opinions of December 16, 1966, on the motion of the Clerks to stay the second election that the Board would entertain and act upon any Clerks objections that votes cast in such election were induced by the fraud previously committed.

The petition also alleged that the Board had no statutory authority to require the Clerks name either appear on the election ballot in a representation election or that the Clerks abandon representation rights; that such action constituted an effort to decertify a union and that the Board had no decertification authority; that the Board's action was contrary to its own long established interpretation and application of the statute; that even if the Board had the asserted authority it was improper to exercise it in the midst of the representation dispute as this changed the rules in mid-stream to the serious and unwarranted disadvantage of the Clerks; that the Board had taken these actions when there was no issue with respect thereto before it and without notice to or opportunity to the Clerks to be heard thereon; and, that the action, if taken at all, should have been taken as an amendment to its rules and regulations in accordance with the required procedures for amending those rules.

The Clerks additionally petitioned the Board to dismiss the Teamsters' application on the ground that a valid representation dispute does not now exist. This petition alleged that because of changes in the size and composition of the craft or class of Pan American employees involved the Board did not now have before it sufficient authorization cards to support the Teamsters' application. The Clerks also requested a hearing on the petition.

(Verified Complaint, para. 17; Tracy affidavit, para. 65, Exhibit 29)

16. On October 12, 1967, the Board heard oral argument on the Clerks' petition. On October 24, 1967, the Board issued its Findings and Order adhering to its decision of September 12, 1967, and denying the Clerks' petition.

(Verified Complaint, para. 19; Tracy affidavit, para. 75, Exhibit 36)

17. Thereafter, the Board assigned a Mediator to conduct an investigation leading up to a third representation election. The Board denied the request of the Clerks that this investigation be scheduled so as not to conflict with a representation investigation in NMB Case No. R-3947 on the property of Braniff Airways also involving the Clerks and Teamsters in order that the Clerks designated representatives, particularly the Director of the Clerks Air Transport Division, could participate in both and that the investigation in NMB Case No. R-3781 not commence until such Director returned from an international conference he was attending as a delegate during the first week of November, 1967. The investigation has proceeded in accordance with the Board's actions of September 12, 1967, and October 24, 1967, over the protest of the Clerks, and an election has been scheduled.

(Verified Complaint, para. 21; Tracy affidavit, paras. 76-89, Exhibits 37-39; Highsaw affidavit and attachments thereto)

18. On November 6, 1967, the Clerks and the individual plaintiffs filed their complaint for declaratory and injunctive relief. The plaintiffs seek a declaratory judgment to the effect that the action of the Board in refusing to dismiss the representation application of the Teamsters in NMB Case No. R-3781 and in ordering a third representation election in that case, as well as the other actions of the Board in connection therewith, are in violation of the requirements of the Railway Labor Act (45 U.S.C.A., Section 151 et seq.) and further ask that the Court enjoin the Board from holding such election and remand NMB Case No. R-3781 to the Board for action consistent with statutory requirements. The complaint alleges that the actions of the Board violate the duty imposed upon it by the Railway Labor Act to conduct fair and impartial investigations; violate its own regulations in implementation of the statute with respect to the conduct of elections and appeals therefrom; and exceed its statutory powers and due process of law. The complaint alleges that the action arises under the Railway Labor Act, as amended (45 U.S.C., Sections 151 et seq.) and 28 U.S.C., Section 2201. It further alleges that the Court has jurisdiction of the subject-matter of the complaint under the provisions of Title 28 of the United States Code Section 1331, 1332, 1337, and 2201, and Section 10 of the Administrative Procedure Act, as amended (5 U.S.C., Section 701). The plaintiffs also moved for a preliminary injunction to enjoin the conduct of the third representation election in NMB Case No. R-3781, pending final determination of the complaint.

(Verified Complaint, paras. 1, 2, 22)

19. Unless enjoined the Board will proceed to conduct the third representation election in NMB Case No. R-3781 as directed in its decisions of September 12, 1967, and October 24, 1967, resulting in irreparable injury to plaintiffs. Such election will impose substantial financial burdens upon the Clerks to conduct another campaign particularly in light of the Board requirement that the Clerks name ap-

pear upon the ballot. Should such election result in the issuance of a certification to the Teamsters to replace the Clerks as representative of the employees involved, a serious question would arise as to the Court's jurisdiction to then act upon the complaint, while at the same time the Clerks would be injured by loss of representation rights and members among the employees involved. The individual plaintiffs would be deprived of the representative of their choice. The defendant Board will not be injured by the issuance of a preliminary injunction pending final determination of the complaint. The public interest in disposing of NMB Case No. R-3781 without further delay is offset by the public interest that the disposition conform to statutory and due process requirement. This latter consideration is called into play by the complaint herein. Moreover, should the plaintiffs prevail upon one or more of their contentions, the Teamster application could be dismissed, or a fourth election required. Less delay can result through a determination of the complaint prior to the conduct of a third election.

(Plaintiffs' Motion for Preliminary Injunction Memorandum and Reply Memorandum In Support Thereof)

20. The matter in controversy under the complaint exceeds the sum of $10,000 exclusive of interest or costs.

(Verified Complaint, para. 6)

CONCLUSIONS OF LAW

1. The complaint raises substantial issues as to whether the Board has acted within its statutory authority under Section 2, Ninth of the Railway Labor Act in its actions enumerated above or has exceeded that authority, and as to whether the Board has acted in conformity with its own promulgated rules and regulations. It also raises substantial issues as to whether the Board has complied with the requirements of Section 2, Ninth and of due process that it conduct a fair and impartial investigation of the representation dispute in NMB Case No. R-3781.

2. The plaintiffs are entitled to a trial and final determination of these issues on the merits. The Court has jurisdiction to entertain the complaint and render a final determination on the issues raised therein under Title 28 of thhe United States Code, Sections 1331, 1332, 1337 and 2201, and Section 10 of the Administrative Procedure Act, as amended (5 U.S.C., Section 701).

3. The plaintiffs have exhausted all administrative remedies available to them. Unless enjoined by this Court, the Board will proceed to conduct a third representation election in NMB Case No. R-3781 in accordance with its decisions of September 12, 1967, and October 24, 1967.

4. The conduct of a third representation election in NMB Case No. R-3781, prior to a final determination of the merits of the complaint, will result in irreparable injury to plaintiffs. The Court has also given consideration to the arguments of the defendants and of the intervening defendant that the public interest and the interest of other parties require a denial of plaintiffs' motion for a preliminary injunction and concludes that they do not outweigh the irreparable injury which will result to the plaintiffs if a third election is conducted under the facts found above prior to a final determination of the merits of the complaint.

5. There is sufficient probability that the plaintiffs will prevail upon the merits of one or more of the issues raised by the complaint herein to warrant this Court granting the plaintiffs' motion for a preliminary injunction.

IT IS, THEREFORE, ORDERED THAT:

1. Plaintiffs' motion for a preliminary injunction be and it hereby is granted.

2. The defendants National Mediation Board and the individual members thereof: Leverett Edwards, Howard G. Gamser, and Francis A. O'Neill, Jr., and any employee or agent thereof, be and they are hereby enjoined from conducting a third representation election among the em-

ployees of Pan American World Airways, Inc., in the proceeding before the Board identified as NMB Case No. R-3781, pending a final determination by this Court of the complaint for declaratory and permanent injunctive relief.

3. The motion of the defendants National Mediation Board et al to dismiss the action or in the alternative to grant defendants summary judgment be and it hereby is denied.

4. The motion of the intervening defendant to dismiss the complaint be and it hereby is denied.

5. The motion of defendants National Mediation Board et al for reconsideration or in the alternative for stay pending appeal be and it hereby is denied.

6. The motion of intervening defendant for reconsideration or in the alternative for modification of proposed order of preliminary injunction be and it hereby is denied.

7. Plaintiffs, or their agent, first file an undertaking with surety, or cash in lieu thereof, in the sum of $100.00 for payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained.

Dated: January 22, 1968.

/s/ JOHN J. SIRICA
John J. Sirica,
United States District Judge

APPENDIX C

District Court's Findings of Fact and Conclusions of Law in Civil Action No. 2854-67

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2854-67

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, 1015 Vine Street, Cincinnati, Ohio 45202

and

MARGARET FLANAGAN, Sherwood Terrace, Apt. 216, Nashville, Tennessee

C. E. ROBINSON, 2521 Collingwood Dr., Dallas, Texas

G. E. SCHULZE, 2909 Flowerdale, Dallas Texas

BERNARD A. GRAY, 1600 Carl Road, Irving, Texas

JAMES C. JONAS, 3950 Dunhaven Rd., Dallas, Texas

EDWARD HARRIS, 1912 Rayburn, Mesquite, Texas

Plaintiffs

v.

NATIONAL MEDIATION BOARD and FRANCIS A. O'NEILL, JR., LEVERETT EDWARDS, HOWARD G. GAMSER, Individually and As Members of The National Mediation Board, 1230-16th Street, N. W., Washington, D. C. 20572,

Defendants.

ORDER GRANTING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTON AND DENYING THE MOTION OF THE DEFENDANTS TO DISMISS THE ACTION OR, IN THE ALTERNATIVE, GRANT DEFENDANTS SUMMARY JUDGMENT

This cause came on to be heard by the Court on December 19, 1967, on the following motions:

(1) The motion of the plaintiffs filed on November 6, 1967, for a preliminary injunction to prohibit the National

Mediation Board, its individual members, and any employee or agent thereof, from conducting a representation election among employees of Braniff International Airways, Inc., in a proceeding before the Board identified as NMB Case No. R-3947, pending final determination by the Court of the complaint herein for declaratory and permanent injunctive relief against the Board and its members, individually and as members of the Board, also filed on November 6, 1967; and

(2) The motion of the defendants, filed on November 30, 1967, to dismiss the action or, in the alternative, to grant the defendants summary judgment on the ground that the Court lacks jurisdiction over the subject matter of the action.

The Court having considered the following documents filed in support of or in opposition to the above-enumerated motions:

(1) The verified complaint; plaintiffs' motion for a preliminary injunction; the affidavit of James L. Highsaw, Jr., and attachments thereto, and the plaintiffs' memorandum in support of the motion;

(2) Defendants' motion to dismiss the action or, in the alternative, grant defendants' summary judgment; the affidavit with attachments of Thomas A. Tracy, Executive Secretary of the National Mediation Board, in support of said motion; defendants' "Statement of Material Facts as to Which There Is No Genuine Issue"; defendants' opposition to plaintiffs' motion for preliminary injunction; defendants' memorandum in support of their motion to dismiss or, in the alternative, for summary judgment and in opposition to plaintiffs' motion for a preliminary injunction; defendants' supplemental memorandum in support of defendants' opposition to plaintiffs' motion for a preliminary injunction and in support of defendants' motion to dismiss or, in the alternative, for summary judgment;

(3) The answer of plaintiffs in opposition to defendants' motion to dismiss or, in the alternative, for summary judgment; plaintiffs' reply to defendants' opposition to plaintiffs' motion for a preliminary injunction; and

The Court having heard argument from the parties in open court in support of and in opposition to said motions, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The plaintiff Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes (hereinafter called "Clerks") is an unincorporated association representing railroad and airline employees. The Clerks were certified on April 5, 1948, by the National Mediation Board as the duly authorized representative for the purposes of the Railway Labor Act (45 U.S.C., Section 151 et seq.) of the clerical, office, stores, fleet and passenger service employees of Braniff International Airways. The Clerks have represented such employees continuously from that date and represent them at the present time. There are presently approximately 4,600 in the craft and class of Braniff employees represented by the Clerks. There has been in existence continuously since 1948 a collective bargaining agreement between Braniff and the Clerks governing the rates of pay, rules, and working conditions of that air carrier's employees represented by the Clerks. The present agreement became effective April 15, 1967, and is currently in force.

(Verified Complaint, paras. 3 and 4; Tracy Affidavit, para. 3, Exhibit 1)

2. The individual plaintiffs are employees of Braniff, are listed on the appropriate seniority rosters provided for by the collective bargaining agreement between the Clerks and Braniff, and have been determined by the National Mediation Board to be eligible to participate in the representation dispute which gives rise to the present complaint.

(Verified Complaint, para. 5; Defendants' Statement of Uncontested Facts, para. 2)

3. The defendant National Mediation Board is an independent agency of the Executive Branch of the United States Government, created by the provisions of Section 4, First, of the Railway Labor Act (45 U.S.C., Section 154, First), for the purposes of carrying out the duties and obligations imposed upon the Board by that statute. The individual defendants, Messrs. Francis A. O'Neill, Jr., Leverett Edwards, and Howard G. Gamser, comprise the membership of the National Mediation Board. Mr. Gamser is presently Chairman of the Board. Among the duties imposed upon the Board by the Railway Labor Act are those set forth in Section 2, Ninth of the statute (45 U.S.C., Section 152, Ninth); to investigate disputes as to who are the representatives of employees of carriers subject to the Act, to determine the duly designated and authorized representative for the purposes of the Railway Labor Act of such employees, and to certify such representatives to the employer carrier. Air carriers, including Braniff, are subject to these statutory provisions.

(Verified Complaint, para. 7)

4. On May 4, 1967, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter called "Teamsters") filed an application with the Board, pursuant to Section 2, Ninth of the Railway Labor Act, to investigate an alleged representation dispute among the clerical, office, stock clerks, fleet and passenger service employees of Braniff and to certify the Teamsters as the duly designated representative of such employees for the purposes of the Railway Labor Act. This application was docketed by the Board as NMB Case No. R-3947. Subsequently, the Teamsters amended the application to eliminate the stock clerks therefrom. After a preliminary investigation the Board on September 25, 1967, directed that a representative election be conducted among the employees involved.

(Verified Complaint, para. 8; Tracy Affidavit, paras. 2-11)

5. Shortly before, on September 12, 1967, the Board in NMB Case No. R-3781, involving a representation dispute on the property of Pan American World Airways, ruled that the Clerks name must go on the ballot in a representation election or the Clerks must abandon all claim to represent the employees involved. On September 21, 1967, the Clerks challenged the Board's statutory authority to so rule, the validity of the procedures followed, and the absence of notice to the Clerks and an opportunity to be heard on the proposed rule. Therefore, on September 28, 1967, the Clerks notified the Board that it did not elect to have its name on the ballot in the representation election in NMB Case No. R-3947; that the Clerks did not thereby intend to abandon its right to represent the employees involved; and that it would continue such representation unless and until the Board issues a new certification to another representative in accordance with the Railway Labor Act and the Board's rules. The Clerks also advised the Board that it has no statutory authority to require that the Clerks name be placed on the ballot or the Clerks must abandon representation rights.

(Verified Complaint, para. 10; Exhibit "A" to Complaint; Tracy Affidavit, para. 12, Exhibit 2)

6. On October 12, 1967, the Board heard oral argument on the Clerk's objections to the Board ruling of September 12, 1967. On October 24, 1967, the Board reaffirmed such ruling and specifically made it applicable to the proceeding on Braniff in NMB Case No. R-3947.

(Verified Complaint, para. 10; Tracy Affidavit, paras. 15 and 16, Exhibit 4)

7. Thereafter, the Board resumed its investigation in NMB Case No. R-3947, involving Braniff. The Board denied the request of the Clerks that the investigation be scheduled so as not to conflict with the representation investigation in NMB Case No. R-3781 on the property of Pan American World Airways also involving the Clerks

and Teamsters in order that the Clerks' designated representatives, particularly the Director of its Air Transport Division, could participate in both and that the investigation in NMB Case No. R-3781 not commence until such Director returned from an international conference he was attending as a delegate during the first week of November, 1967. The investigation has proceeded in accordance with the Board's actions of September 12, 1967, and October 24, 1967, over the protest of the Clerks and an election has been scheduled.

(Verified Complaint, para. 12; Tracy Affidavit, paras. 17-23; Highsaw Affidavit and attachments thereto)

8. On November 6, 1967, the Clerks and the individual plaintiffs filed their complaint for declaratory and injunctive relief. The plaintiffs seek the following relief:

(a) A declaratory judgment by the Court that the defendant National Mediation Board had no legal authority to rule that plaintiff Clerks must either have its name on the election ballot in NMB Case No. R-3947 or abandon is right to represent clerical, office, and related employees of Braniff International Airways;

(b) A permanent injunction enjoining the Board from imposing the above-described requirement on the Clerks; and

(c) An injunction enjoining the Board from resuming and completing its investigation on Braniff in NMB Case No. R-3947, including and conducting of a representation election, until the Board has given the Clerks a reasonable opportunity to participate in such investigation through persons designated by the Clerks for that purpose.

The complaint alleges that the action of the Board exceeds the statutory power of the Board under Section 2, Ninth of the Railway Labor Act; violates the requirements of that Section that the Board conduct a fair and impartial investigation; and is contrary to the requirements of due process of law. The complaint alleges that the action arises under the Railway Labor Act, as amended (45 U.S.C., Sec-

tions 151 et seq.) and 28 U.S.C., Section 2201. It further alleges that the Court has jurisdiction of the subject matter of the complaint under the provisions of Title 28 of the United States Code, Sections 1331, 1332, 1337, and 2201, and Section 10 of the Administrative Procedure Act, as amended (5 U.S.C., Section 701). The plaintiffs also moved for a preliminary injunction to enjoin the conduct of the representation election in NMB Case No, R-3947, pending final determination of the complaint.

(Verified Complaint, paras. 2, 11-13)

9. Unless enjoined the Board will proceed to conduct the representation election in NMB Case No. R-3947 as directed in its decision of October 24, 1967, resulting in irreparable injury to plaintiffs. Such election will impose substantial financial burdens upon the Clerks to conduct a campaign, particularly in light of the Board requirement that the Clerks name appear upon the ballot. Should such election result in the isspance of a certification to the Teamsters to replace the Clerks as representative of the employees involved, a serious question would arise as to the Court's jurisdiction to then act upon the complaint, while at the same time the Clerks would be injured by loss of representation rights and members among the employees involved. The individual plaintiffs would be deprived of the representative of their choice. The defendant Board will not be injured by the issuance of a preliminary injunction pending final determination of the complaint. The public interest in disposing of NMB Case No. R-3947 without delay is offset by the public interest that the disposition conform to statutory and due process requirements. The latter consideration is called into play by the complaint herein. Moreover, should the plaintiffs prevail upon one or more of their contentions, another election might result. Less delay can result through a determination of the complaint prior to the conduct of an election.

(Plaintiffs' Motion for Preliminary Injunction Memorandum and Reply Memorandum In Support Thereof.)

10. The matter in controversy under the complaint exceeds the sum of $10,000 exclusive of interests or costs.

(Verified Complaint, para. 6)

CONCLUSIONS OF LAW

1. The complaint raises substantial issues as to whether the Board has acted within its statutory authority under Section 2, Ninth of the Railway Labor Act in its actions enumerated above or has exceeded that authority. It also raises substantial issues as to whether the Board has complied with the requirements of Section 2, Ninth and of due process that it conduct a fair and impartial investigation of the representation dispute in NMB Case No. R-3947.

3. The plaintiffs are entitled to a trial and final determination of these issues on the merits. The Court has jurisdiction to entertain the complaint and render a final determination on the issues raised therein under Title 28 of the United States Code, Sections 1331, 1332, 1337 and 2201, and Section 10 of the Administrative Procedure Act, as amended (5 U.S.C., Section 701).

3. The plaintiffs have exhausted all administrative remedies available to them. Unless enjoined by this Court, the Board will proceed to conduct a representation election in NMB Case No. R-3947 in accordance with its decision of October 12, 1967.

4. The conduct of a representation election in NMB Case No. R-3947, prior to a final determination of the merits of the complaint, will result in irreparable injury to plaintiffs. The Court has also given consideration to the argument of the defendants that the public interest and the interest of other parties require a denial of plaintiffs' motion for a preliminary injunction and concludes that they do not outweigh the irreparable injury which will result to the plaintiffs if an election is conducted under the facts found above prior to a final determination of the merits of the complaint.

5. There is sufficient probability that the plaintiffs will prevail upon the merits of one or more of the issues raised by the complaint herein to warrant this Court granting the plaintiffs' motion for a preliminary injunction.

IT IS, THEREFORE, ORDERED THAT:

1. Plaintiffs' motion for a preliminary injunction be and it hereby is granted.

2. The defendants National Mediation Board and the individual members thereof: Leverett Edwards, Howard G. Gamser, and Francis A. O'Neill, Jr., and any employee or agent thereof, be and they are hereby enjoined from conducting a representation election among the employees of Braniff International Airways, Inc., in the proceeding before the Board identified as NMB Case No. R-3947, pending a final determination by the Court of the complaint for declaratory and permanent injunctive relief.

3. The motion of the defendants National Mediation Board, et al to dismiss the action or, in the alternative, to grant defendants summary judgment be and it hereby is denied.

4. Plaintiffs, or their agent, first file an undertaking with surety, or cash in lieu thereof, in the sum of $100.00 for payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained.

5. The motion of defendants National Mediation Board, et al for reconsideration or in the alternative for stay pending appeal be and hereby is denied.

Dated: January 22, 1968

/s/ JOHN J. SIRICA
John J. Sirica,
United States District Judge

APPENDIX D

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,620

INTERATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Appellant*,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, ETC., *Appellees*

No. 21,622

No. 21,623

NATIONAL MEDIATION BOARD, ET AL., *Appellants*

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, ETC., *Appellees*

Appeals from the United States District Court
for the District of Columbia

Decided June 28, 1968

Mr. Herbert S. Thatcher, with whom *Mr. David Previant* was on the brief, for appellant in No. 21,620. *Mr. Donald M. Murtha* also entered an appearance for appellant in No. 21,620.

Mr. John C. Eldridge, Attorney, Department of Justice, with whom *Assistant Attorney General Edwin L. Weisl, Jr.,* was on the brief, for appellants in Nos. 21,622 and 21,623.

Mr. James L. Highsaw, Jr., with whom *Mr. Edward J. Hickey, Jr.* was on the brief, for appellees.

Before BURGER, TAMM and LEVENTHAL, *Circuit Judges.*

LEVENTHAL, *Circuit Judge:* In these consolidated actions, the National Mediation Board (Board) and the Teamsters [1] appeal a District Court order granting a preliminary injunction restraining the Board from holding representation elections among clerical and office employees of Pan American and Braniff Airways. The Railway Clerks (Clerks),[2] presently certified by the Board as bargaining representative of both groups of employees, sought the injunctions, alleging that the Board had violated its statutory duties in scheduling a third election rather than dismissing the Teamsters' petition on the basis of the second election. The Clerks also contend that the Board in any event had no statutory authority to compel the Clerks to appear on the election ballot or forswear further representation of the employees.[3]

The District Judge, denying the Board's cross-motion to dismiss the complaint, found the threatened harm irreparable and the questions substantial, and he therefore

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[1] International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

[2] Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees.

[3] The Clerks also claim they were denied due process by the Board's scheduling investigations of both disputes at the same time, so that their chosen representative could not be present at both. The Railway Labor Act, however, places great emphasis on speedy resolution of representation disputes. "Since the requirements of due process frequently vary with the type of proceeding involved," Hannah v. Larche, 363 U.S. 420, 440 (1960), we do not find the Constitutional claims meritorious.

held that there was jurisdiction to issue a preliminary injunction. We reverse. The complaint should have been dismissed.[4] Given the broad power vested in the Board under the doctrine of *Switchmen's Union* v. *National Mediation Board,* 320 U.S. 297 (1943), the actions here do not justify judicial intervention.

We set forth the background of the controversy and begin with the observation that this is one of those cases requiring a lot of reference to the merits in order to make clear that there is no room for exercise of judicial power. This court was concerned with an earlier phase of the Pan American dispute in *Brotherhood of Railway and Steamship Clerks* v. *NMB,* 126 U.S. App. D.C. 55, 374 F.2d 269 (1966). Briefly, in 1965, the Teamsters filed an application with the Board pursuant to section 2, Ninth of the Railway Labor Act,[5] requesting Board investigation of a representation dispute among Pan American's clerical employees. The Teamsters Union claimed majority support, entitling it to certification as employee representative instead of the Clerks. The Board held a mail ballot election in August of 1966, but the ballots were impounded before they were counted. Letters had been sent to the employees over the forged signatures of George Meany and C. L. Dennis, President of the Clerks, stating that the Clerks' name had been erroneously omitted from the ballot, and that a write-in campaign was being conducted on their behalf. This was a lie. The Clerks were off the ballot intentionally because under Board practice a new union would be certified only if more than 50% of the employees in the unit

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[4] Where a preliminary injunction has been granted, and that order is appealed, we may properly review the denial of the motion to dismiss the complaint, although that ruling would not otherwise be appealable. Deckert v. Independence Shares Corp., 311 U.S. 283 (1940); FTC v. Cinderella Career and Finishing School, — U.S. App. D.C. —, —F.2d — (1968).

[5] 45 U.S.C. § 152, Ninth.

actually voted in the election for some collective representation. Given that some employees would not bother to vote in any event, the incumbent union had a strategic advantage by telling its employees not to vote, because that way a challenger had to poll an absolute majority. In other words, if the incumbent's (non-voting) supporters, plus employees indifferent to or against collective representation, totalled more than 50% of the employees in the unit, then the challenging union's petition would be dismissed. According to the Clerks, that would leave the status quo ante in effect between the carrier and the still certified Clerks. That tactic would backfire, however, had write-in votes for the incumbent pushed the total employee participation in the election over the 50% mark.[6]

The Board in October 1966 set aside the election and directed that another mail ballot election be held in November 1966. The Clerks protested that this was too soon after the mailing of the forged letters to permit the fraud to be fully attenuated. After the Board rejected this contention, the Clerks sued to enjoin the election. The District Court held that there was no judicial power to interfere, but doubts were expressed on the wisdom of such a hasty second campaign. This court denied a stay of the election pending appeal, concluding that "although the record does suggest that the Board has not been sufficiently concerned to scrape away all stain of the fraud,

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[6] The Board treats all non-voters as desiring no representation, and in effect, voting for that by refraining from casting a ballot in the election. The Board does not permit votes against representation except in that manner. That is, a write-in ballot for "no union" is an invalid ballot. The voter's preference is effectuated anyway by the Board's treating that "vote" as not having been cast, and therefore indicative of disapproval of representation.

The Board does not provide on its ballot for any means by which the voters may express secondary preferences. It is presumed that all favoring representation by some union will prefer representation by any union to going unrepresented.

we hesitate to conclude that the Board's action was so gross as to invest the court with jurisdiction."[7]

After this court's decision issued in late December 1966, the Board began counting the ballots, which had been mailed to the employees in November and had been returned in early December. The vote was close. There were at this time 6936 employees in the unit. The Teamsters received 3091 votes. There were 137 write-ins for the Clerks, and 284 write-ins for the Transport Workers Union. If all ballots were valid, they would account for a majority of the employees, and satisfy the condition necessary for a vote to be of sufficient size to permit replacement of the existing representative. Since the Teamsters had a majority of the votes, that union would have been entitled to certification under the Board's practice.

Both the Clerks and the Teamsters appealed to the Board certain rulings made by the Mediator in counting the ballots. Only the Clerks' objections are relevant here. The Clerks challenged 1178 ballots counted by the Mediator. The 137 write-in votes for the Clerks were claimed to be invalid as being the product of the forged letter, for which the Clerks felt the Teamsters were responsible.[8] The 284 write-in votes for the Transport Workers were allegedly invalid

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[7] Brotherhood of Railway and Steamship Clerks v. NMB, *supra*, 126 U.S. App. D.C. at 59, 374 F.2d at 273.

[8] The forged letters urged the employees to write-in "Brotherhood of Railway Clerks," or "BRC." These designations were used on the majority of the 137 write-in ballots. From that, the Clerks argue that these employees were influenced by the forged letters.

The Board points out, however, that regardless of whether the ballots were induced by the fraudulent letters, the employees who cast them thereby evinced a desire for representation. On the theory, see note 6 *supra*, that they would prefer representation by the Teamsters to going unrepresented, the Board might properly have counted those ballots towards the 50% participation required for a valid election.

because the Transport Workers, pursuant to an inter-union no-raiding agreement, could not represent these employees.[9] Some 754 ballots for the Teamsters were contested because they were taken from unpostmarked envelopes, and allegedly the ballots had been removed from Post Office custody for two weeks contrary to election ground rules.[10]

The Board did not rule on any of these contentions. Rather on September 12, 1967, it issued an opinion stating in part:

> "The Board has carefully reviewed each of these points raised by the respective organizations and finds that no useful purpose would be served by an item by item discussion of the merits of these objections. It is our view that several of these objections are peripheral and without merit, but in reaching our determination, it is incumbent upon us to inspect the whole congeries of facts alleged and incidents complained of concerning the course of the second election and make an assessment based thereon."

The opinion went on to note statements by this court and the District Court expressing doubts that the short time between elections was sufficient to remove all possibility

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[9] The Transport Workers had been involved in a representation dispute concerning these employees, but pursuant to an arbitration award they had been held foreclosed from challenging the Clerks. The Clerks contend that as the Transport Workers cannot validly represent the employees, the Board must treat as invalid the votes for that union.

Again the Board responds that the only purspose for which the votes are being used is to show that more than 50% of the employees wish representation of some sort.

[10] The envelopes were sent under a Government frank. Post Office regulations require that all mail be postmarked, regardless of whether so franked, but the Board contends that this rule is frequently broken, particularly when the mailing is in the Christmas season.

that the forged letters might affect the second election. The Board then stated that it too was disturbed that the election results might not reflect "the free and clear choice of the employees affected."

The second election was therefore set aside and a third election ordered. This made it unnecessary to rule on any of the objections. Moreover, the Board also recited that much of the confusion that had delayed this case was attributable to the Clerks' absence from the ballot, as they in fact had hopes of continuing to represent these employees. In granting the Clerks permission to stay off, said the Board, it had failed to adhere to its long-standing and consistently applied policy. Therefore in the third election, the Clerks were either to go on the ballot or forswear future representation.

This same policy was applied to the Braniff dispute, also before us, a representation dispute that had recently been filed. There too the Board ordered the Clerks to appear on the ballot or relinquish representation rights. This Braniff election, and the third Pan American election, were preliminarily enjoined by the District Court in these proceedings.

I

On appeal, the Clerks argue that the rules of the Board and its prior practice require it to resolve their challenges to the ballots and to dismiss the Teamsters' petition should any of these challenges be accepted.[11] We reject this contention without tarrying to consider the finer points of the scope of judicial rview, or non-review, of Board determina-

[11] The Clerks also contend that the authorization cards used to start the dispute in the Pan American case are no longer valid to sustain it, because there has been substantial personnel turnover, as well as increase in the size of the unit. The Board, under its rules, treats the old cards as continuing the dispute. We find no basis for saying this procedure is outside the Board's statutory power.

tions. The Railway Labor Act places on the Board the duty to "investigate" representation disputes and to ascertain, by ballot or by other appropriate means, the wishes of the employees as to who shall represent them. Where obvious reasons are present for doubting whether an election accurately reflects employee wishes, the Board's decision to hold another election is an eminently reasonable exercise of its powers. Moreover we note that the ballots in the second election had already been received by the Board prior to issuance of the judicial opinions, issued in the very action the Clerks brought, questioning the wisdom of the Board's decision to hold an immediate second election. The Board can hardly be faulted for deciding to try again, particularly when the results were so close.

II

More substantial problems are raised by the Clerks' contention that the Board had no power to order the Clerks to appear on the ballot or give up any further representation of the employees. For the Clerks this is the key ruling, for if implemented they lose the tactical advantages the incumbent heretofore enjoyed.[12] The essence of the Clerks' contention is that the Board has no power whatever to decertify a union; all it may do is certify some new representative. Unlike the National Labor Relations Act, the Railway Labor Act has no decertification provisions. Thus, the Clerks argue, if the Board holds an election in which fewer than 50% of the employees vote, under the present rules no certificate can issue to the Teamsters. The absence

[12] The Clerks claim they are irreparably injured in the Pan American dispute because in the past two elections they have been urging their supporters not to vote. Allegedly, it will be impossible to shift gears abruptly if they are on the ballot. We doubt the substance of the claim, particularly as the last election was in December 1966. In any event, it does not rise to constitutional dimension, and other than that the Act leaves such matters to the judgment of the Board.

of a decertification provision in the statute means, it is contended, that any questions of the continuing vitality of the old certificate are questions for the courts that will arise should the carrier refuse to negotiate or should employees challenge the continuing representation by a union. Meanwhile the carrier at least may (and perhaps must) deal with the representative that has been certified and never decertified, the Clerks.

There is an anomaly in trying to throw these questions to the courts *ab initio* when the law generally stresses Board discretion in these matters to the exclusion of all other considerations. In any event, the Clerks' argument does not and cannot vault over the hurdle erected by the Supreme Court's decision in *Brotherhood of Railway Clerks* v. *Association for the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965). There the Supreme Court indicated that employees under the Railway Labor Act were to have the option of rejecting collective representation entirely. The decision precludes a ruling that the Board's sole power is to certify someone or group as an employee representative, imposing on the carrier a duty to treat with that representative. We think that the Board has the power to certify to the carrier that a particular group of employees has no representative to carry on the negotiations contemplated by the Railway Labor Act, thereby relegating the carrier and its employees to employment relationships and contracts not presently governed by the Railway Labor Act.

In *Railway Clerks* v. *Association, supra,* the Court held erroneous the issuance of an injunction to prohibit the Board "from conducting an election with a ballot that did not permit an employee to cast a ballot against collective representation." 380 U.S. at 668. The Court held that the Board had broad statutory authority to select procedures and ballots for determining employee representatives. The failure to provide a "no-union" box on the ballot did not

exceed this authority. In so holding, however, the Court stated that "the legislative history supports the view that the employees are to have the option of rejecting collective representation." 380 U.S. at 669 n.5. It went on to note that the Board's present practice of treating non-voters as voting against representation did in fact give employees who wished no collective representation a chance to be heard. We need not occupy ourselves with the question whether the statement upholding an employee right to reject collective representation is technically ratio decidendi or dictum. The statement was plainly carefully considered, in view of the nature of the dissent, which pointed out that the Board had been interpreting the Act as strongly favoring collective representation.

It is true, as the Clerks point out, that that case involved an attempt to unionize employees not then collectively represented, rather than, as here, an attempt by one union to dislodge another. We agree with counsel for the Board, however, that it is inconceivable that the right to reject collective representation vanishes entirely if the employees of a unit once choose collective representation. On its face that is a most unlikely rule, especially taking into account the inevitability of substantial turnover of personnel within the unit.

The right of employees to reject collective representation, recognized in *Railway Clerks* v. *Association*, yields as a corollary the Board's implied power to certify to the carrier that in a particular unit the employees have in fact rejected such representation. In effect, the Board's present direction to the Clerks means that unless they are willing to give up their status as authorized representative, they will be put on the ballot, like it or not, and further, that should they be on the ballot and fewer than one-half of the employees vote, the Board intends to certify to the carrier that these employees have no representative for purposes of the Act. The Board has in the past refused to certify a representative, when an election among un-

organized employees failed to elicit the votes of 50% of the employees, without any hue and cry that employees must be represented so that the negotiations contemplated by the Act may go on.[13] The Board may not only decline to certify a representative, but may go further and certify that there is no representative.

III

Although we find the Board has statutory power to adopt the on-the-ballot policy outlined, we confess considerable uneasiness whether the Board has, with attention to the possible ramifications, evolved a general policy which it intends to apply in all further representation disputes.

This on-the-ballot policy originated in the order of September 12, 1967, in the Pan American case. It was subsequently applied to the Braniff dispute. The Clerks raise questions concerning the way the Board in September justified its order to the Clerks, to get on the ballot or out of the picture, as adherence to "a consistent policy in representation matters to the effect that where an incumbent union was challenged by a petitioner under Section 2, Ninth, it must, if a proper representation dispute existed, participate in any election." The Board referred to *Railway Clerks* v. *Association*, but only as reinforcing the correctness of the past policy. Urging reconsideration by

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[13] The parties have not alerted us to any authorities on the question, and we need not consider at this juncture, whether or in what circumstances a carrier under no Railway Labor Act duty to treat with representatives of the employees because none are authorized, could lawfully deal with a non-certified labor organization concerning matters that are normally required subjects of negotiation between authorized management and employee representatives. Compare, where there is an unresolved dispute as to who is the employee representative, Pan American World Airways, Inc. v. Int'l Brh'd of Teamsters, 275 F. Supp. 986 (S.D.N.Y. 1967).

the Board, the Clerks pointed out that the alleged "consistent policy" was not only unsupported by the cases cited in the Board's opinion, but that in at least 16 reported cases between 1940 and 1967 (three of them involving the Clerks) an incumbent union was permitted to stay off the ballot without application of any such policy.

In October 1967, the Board issued a finding and an order on reconsideraton, in both the Pan American and Braniff disputes. This opinion adhered to the on-the-ballot ruling announced in September, "without contesting or conceding" the accuracy of the Clerks' challenge. The Board again relied heavily on the confusion that might have existed in the first two elections from the failure of the employees to see the Clerks on the ballot. However, the Board also stressed that it had "little discretion to adopt any other course" in light of the Supreme Court's statements in *Railway Clerks* v. *Association, supra,* which the Board read as mandating that non-voters be counted against collective representation in order to effectuate the employee right to reject all representation.

We find unsettling the Board's reliance on the confusion caused by the Clerks' failure to appear on the ballot in the Pan American case. That confusion was fostered by the two forged letters. Although the perpetrators of that forgery have not been apprehended, it would seem unfair, given the unlikelihood that the Clerks were responsible, to say that the reprehensible acts of other persons require that the Clerks be deprived of the same advantage the Board would permit in the case of other incumbent unions.

Likewise unsettling is the Board's apparent view that the Supreme Court gives it no choice but to continue its present ballot, with an on-the-ballot policy. As we have already said, we think the ruling in *Railway Clerks* v. *Association* does authorize the Board to fashion such a requirement. But that decision stressed the Board's broad power to control balloting, and there are other ballots that

might be used to effectuate an employee right to reject collective representation. Different balloting procedures might have different impacts on the stability of representation.[14] We note that the Board, in order to realize stability of representation,[15] does not utilize the presumption, used by the National Labor Relations Board, that non-voters concur in the wishes of the majority of voters, thereby permitting certification regardless of whether a majority of employes participate in the election.[16]

The choice of what policy to follow is essentially for the Board to make. It is, however, for that very reason disturbing that on the one hand the courts refuse to involve themselves deeply in the substance of these questions, emphasizing the nearly unlimited powers of the Board, while on the other, the Board is heard to protest that its answers are mandated by the need for application of dictum in judicial opinion. This Alphonse-Gaston interplay is disquieting, with all due allowance for the possibility that the Board has given full consideration to the considerable

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[14] For example, the Board might change its old policy and add a "no union" box to the ballot.

[15] NMB Case No. R-1818, decided June 30, 1948.

[16] The Attorney General supported, 40 Ops. Att'y Gen. 541 (1947), the NMB's power to certify an authorized employee representative even though a majority of the employees did not participate in the election, relying on Virginian Ry. v. System Federation No. 40, 300 U.S. 515 (1937). There the Court upheld the use of a presumption that non-voters concur in the wishes of the majority of voters. That case might be distinguished because a majority of the employees in the unit did participate, and the Court noted that fact. However, the Court's reliance in *Virginian Ry.* on an analogy to political elections served to support NLRB power to certify a union even where a majority of the unit did not participate in the election, *e.g.*, NLRB v. Standard Lime & Stone Co., 149 F. 2d 435 (4th Cir.), *cert. denied*, 326 U.S. 723 (1945).

problems, and uses court precedent as a palliative against pressures rather than as a prime mover of Board action.

Board counsel assures us that the Board's policy is one for all seasons. But just as appellate counsel may not shore up an agency decision by constructing after the fact his own eminently reasonable foundation for it,[17] so too there are limits to the repair carpentry that may be accomplished by representations of agency intentions left unclear by the record.

While the Board's position is not stated as clearly as we would like, or might require if its orders came within the customary framework of court review of administrative action, we do find some reassurance (although the Clerks obviously do not) in the Board's application of this on-the-ballot policy to the Braniff dispute. In Braniff the elections have not been confused and rendered atypical by forgery, auguring that the Board intends its standard to be generally applied. Moreover, the facts of the Pan American dispute were well suited to driving home the Alice-in-Wonderland quality of any election where one of the major disputants stays off the ballot, surviving only by inducing the electorate not to participate in the election process. We take the matter then as one where the Board has stated, and intends, its ruling as a policy of general application, and need not consider the question that would arise if its actions revealed, beyond power of honest contradiction, that the Clerks were being treated differently from others.

The nub of the matter is this: The courts "must put aside the kinds of disquietude that we have sketched in deference to the doctrine of *Switchmen's Union*" that the courts have no jurisdiction to intervene in representation disputes

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[17] Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962); Braniff Airways, Inc. v. CAB, 126 U.S. App. D.C. 399, 379 F. 2d 453 (1967).

committed by the Railway Labor Act to final Board action.[18] The Act puts a premium on speed of resolution; indeed, the Board is directed to resolve representation disputes within 30 days . In *Switchmen's Union* v. *NMB, supra,* 320 U.S. at 305, the Court wrote that "The intent seems plain—the dispute was to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law."

That purpose may be fulfilled only if the courts are extremely chary of involving themselves. The narrow exceptions to the "jurisdictional" bar created by *Leedom* v. *Kyne,*[19] and similar cases must be instances of constitutional dimension or gross violation of the statute. The exception inevitably eliminates any strict concept of lack of jurisdiction, since it permits a peek at the merits. The reconciliation of doctrine lies not in concepts but in practicalities. The retention of the doctrine negativing jurisdiction to consider the merits serves to confine the assertion of jurisdiction to cases where the error on the merits is as obvious on the face of the papers as the viola-

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[18] Brotherhood of Railway Clerks v. Association for the Benefit of Non-Contract Employees, 380 U.S. 650 (1965). In this court *see, e.g.,* UNA Chapter, Flight Engineers Int'l Ass'n v. NMB, 111 U.S. App. D.C. 121, 294 F. 2d 905 (1961), *cert. denied* 368 U.S. 956 (1962); WES Chapter, Flight Engineers Int'l Ass'n v. NMB, 114 U.S. App. D.C. 229, 314 F. 2d 234 (1962).

[19] 358 U.S. 184 (1958). *See* Railway Clerks v. Association, *supra,* 380 U.S. at 660: "The limited nature of this holding [Leedom v. Kyne] was re-emphasized only last term where we referred to the 'narrow limits' and 'painstakingly delineated procedural boundaries of *Kyne.*' Boire v. Greyhound Corp., 376 U.S. 473, 481 (1964)." However, there was no indication in *Railway Clerks* v. *Association* that *Leedom* v. *Kyne* was reserved for cases arising under the National Labor Relations Act. It is generally assumed that *Leedom* does apply to matters arising under the Railway Labor Act.

tion of specific statutory language, without extension to "arguing in terms of policy and broad generalities as to what the Railway Labor Act should provide."[20] As this court has written, the Board's action must be "so plainly beyond the bounds of the Act, or . . . so clearly in defiance of it, as to warrant the immediate intervention of an equity court."[21] This case does not bring us to such a pass.

Reversed and Remanded.

Judge Tamm concurs in the result reached and the action taken in the above opinion insofar as it reverses the District Court's actions and authorizes the National Mediation Board to schedule the third election discussed in the opinion.

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[20] That cautionary language was used in the Railway Clerks v. Association, *supra*, 380 U.S. at 671.

[21] Local 130, Int'l Union of Elec., Radio & Machine Workers v. McColloch, 120 U.S. App. D.C. 196, 201, 345 F. 2d 90, 95 (1965).

APPENDIX E

[Filed Jun 28 1968]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1967

No. 21,620

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Appellant*

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, ETC., ET AL., *Appellees*

No. 21,622
No. 21,623

NATIONAL MEDIATION BOARD, ET AL., *Appellants*

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, ETC., ET AL., *Appellees*

Appeals from the United States District Court for the District of Columbia.

Before: Burger, Tamm and Leventhal, Circuit Judges.

Judgment

These cases came on to be heard on the record on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION THEREOF, it is ordered and adjudged by this court that the order of the District Court appealed from in these cases is reversed, and that these cases are

remanded to the District Court for proceedings consistent with the opinion of this court.

Per Circuit Judge Leventhal

Dated: June 28, 1968

Circuit Judge Tamm concurs in the result reached and the action taken insofar as it reverses the District Court's actions and authorizes the National Mediation Board to schedule the third election discussed in the opinion.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 26 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 363.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al.,
Petitioners,

v.

NATIONAL MEDIATION BOARD, et al., INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

OPPOSITION OF RESPONDENT INTERNATIONAL BROTHERHOOD OF TEAMSTERS.

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IN THE

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Respondents.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

OPPOSITION OF RESPONDENT INTERNATIONAL BROTHERHOOD OF TEAMSTERS.

QUESTIONS PRESENTED.

1. Whether a Federal District Court has jurisdiction or statutory authority to issue a preliminary injunction prohibiting the National Mediation Board from conducting elections to resolve long-standing representation disputes under the Railway Labor Act on the ground that the Board is improperly requiring the incumbent union either to appear on the ballot or abandon its representation claim.

2. Whether the National Mediation Board, by denying objections to a previous election at Pan American and ordering another election because of confusion, uncertainty and alleged fraud in the previous election, so abused its discretion or so disregarded the provisions of the Railway Labor Act as to justify judicial intervention through an injunction procedure.

STATEMENT OF CASE.

The statement of the case set forth in the petition herein neither crystallizes the legal issues in question nor states all the relevant facts.

The issue at bar is not whether the Teamsters or any other union is entitled to represent certain employees of Pan American and Braniff; the only question presented in this case is whether the National Mediation Board may conduct an election in which all interested unions must declare their positions and participate in the voting process in a manner which will avoid further confusion and industrial unrest. The challenged holding does not determine who shall represent the employees involved, but merely whether an agency may exercise some discretion and flexibility in its election procedures in order to bring a final determination to a 30-day investigation which has been stretched into a three year gauntlet of confusion and procrastination.

The facts omitted from the petition demonstrate the basis for the NMB's decision to take the position of which petitioner complains. These are:

1. The incident of the forged letters upon which the Brotherhood of Railway and Airline Clerks (Clerks) placed reliance in their objections to the second election in Pan American occurred two years ago in August, 1966. Hence the effects thereof had been fully dissipated. Moreover, at the same time, the carrier Pan American also sent a letter to all the clerical employees involved in the election stating that if they desired the Clerks to continue as their bargaining representative they should so signify on the ballot (R. 205). Thus, it is impossible to determine which letters caused confusion in the first election in which the Clerks had declined to remain on the ballot.

2. The forged letters were circulated by unknown persons. The Teamsters represented to each of the courts involved in the legal proceedings below that they had no responsibility for the forged letters and invited an investigation by the Criminal Division of the Department of Justice. That Division, after many months of investigation, advised the National Mediation Board that it had "concluded against criminal prosecution" (R. 77).

In addition, Teamsters, on January 2, 1968, filed an affidavit sworn to by Mr. Henry J. Breen, the Director of the Teamsters Airline Division and the individual solely in charge of the Pan American election campaign, stating that he had conducted an investigation to determine whether anyone in such Division or otherwise connected with or sponsored by the Teamsters had been responsible for the transmission of the fraudulent letters, and had been unable to find any such responsibility (R. 202). Neither the NMB nor any court at any time found that the Teamsters union was responsible for the letters.

In the second election only 137 votes out of a total of 3517 cast were write-in ballots for the Clerks. In ordering a third election because of the confusion and uncertainty created *inter alia* by the refusal of the Clerks to appear on the ballot, the Board found that "none of the objections [of either union] were of sufficient merit to justify the determination to sustain or dismiss the results of the election held" (R. 26).

3. The long delay (over three years) since the filing by the Teamsters of an application with the Board to investigate the representation dispute at Pan American, then accompanied by a 51% card authorization showing of interest, has resulted in considerable and increasing labor unrest. The clerical employees of Pan American have been unable to obtain the same benefits of collective bargaining that have been obtained by their fellow workers

in other crafts (R. 202-204). See also amicus intervention in court below of Pan American urging an immediate election because of work interruptions and disruption occasioned by the delay in resolution of the dispute over representation (Appendix F of Motion of Teamsters to Vacate Stay, filed with this Court on July 15, 1968). See also decision of the U. S. District Court for the Southern District of New York in *Pan American World Airways, Inc. v. IBT*, 275 F. Supp. 986 (S. D. N. Y. 1967), in which the court enjoined the Clerks from striking to obtain a collective bargaining agreement until after the representation dispute was resolved by the Board and in which the Court deplored the long delay.

REASONS FOR DENIAL OF WRIT.

This case is not one in which the intervention of this Court is warranted under Rule 19. As will be seen, the actual holding herein is not in conflict but rather in agreement with the applicable decisions of this Court and of the federal courts of appeal, and involves no new or unchartered area of application of federal law. The Court of Appeals below, far from sanctioning a departure from an accepted and usual course of judicial proceedings, has required the District Court in this case to follow prevailing judicial precedents.

I.

The principal complaint of the petitioner is that the court below, by permitting judicial review of the National Mediation Board's determinations only in instances of "gross violation of the statute", i. e., the Railway Labor Act, has added an additional dimension to reviewability. Whatever the descriptive term used by the court below by way of dictum and emphasis, the actual holding is restricted to what the facts of this case which show no violation of the statute, gross, plain or otherwise.

The Board's duty under the Railway Labor Act to resolve disputes between unions over representation rights

is simply "to investigate such dispute and certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier."—Railway Labor Act, Sec. 2. Ninth.

The Board has been investigating the present dispute not for thirty days but for over three years with no resolution yet in prospect because of the successive legal procedures invoked by the Clerks, all contrary to the mandate of this Court in *Switchmen's Union v. National Mediation Board*, 320 U. S. 297, that "there was to be no dragging out of the controversy into other tribunals of law." As the court below stated in another case in which there was an attempt to interfere with the investigation functions of the National Mediation Board by court action:

> "The need for a large degree of conclusiveness in the settlement of labor disputes over the question of employee representation in the transportation industry was met by Congress in the Railway Labor Act. Responsibility was given to a board with special competence in the effort to maintain enough harmony to prevent interruption of service. *Congress sought to preclude litigation in the courts* over what the Supreme Court has called an 'explosive problem'." *WES Chapter Flight Engineers International v. National Mediation Board*, 114 U. S. App. D. C. 229, at 231, 314 F. 2d 232, at 326. (Emphasis supplied.)

This Court has indicated in *Switchmen's Union* and *Employees Association*,* that only flagrant abuse of the Board's discretion or clear failure to follow express provisions of the Railway Labor Act can justify court interference.

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* *Switchmen's Union v. National Mediation Board*, 320 U. S. 297; *Railway Clerks v. Employees Ass'n.*, 380 U. S. 650.

II.

Two elections have already been held in Pan American Airways. The Board's agents conducting the last election had found that the Teamsters should have been certified as the bargaining representative, but the Board concluded that conditions of confusion and uncertainty which still existed at that time made it unnecessary to definitely resolve objections filed by both the Teamsters and the Clerks. The Court observed, however, that the objections were without merit. The Board found the confusion was caused not only by the uncertainty of the employees as to whether they could vote for the Clerks but also by the fact that the Clerks had refused to have their name placed on the ballot. Accordingly, it directed that each union be required either to appear on the ballot or abandon its claim to representation rights.

Nothing in the Railway Labor Act prevents the Board from adopting such a rule. Although Section 2, Ninth of the Act, does not require the Board to use the election process to ascertain the choice of a bargaining representative, when the election process is utilized, the Board is authorized, also under Section 2, Ninth, to establish its own rules to govern the election and to designate its own form of ballot and who is to appear on it. See *Railway Clerks v. Employees Ass'n.*, 380 U. S. 650, where at 671 this Court held:

> "The Board's choice of its proposed ballot is not subject to judicial review, for it was to avoid the haggling and delays of litigation that such questions were left to the Board."

In the same case at 669 this Court stated: • • • "the details of selecting respresentatives were to be left for the final determination of the Board . . .",

Nor can such a requirement be deemed unreasonable or arbitrary. On the contrary, in view of the confusion that has plagued the two previous elections because at least

some of the employees did not know how to express their choice, it would seem that the Board's requirement is not only reasonable but necessary.

III.

The Clerks' argument that the 137 write-in votes for the Clerks were induced by fraud and thus should be discounted so that the Teamsters' application would have to be dismissed is clearly without merit.

1. Such a contention of fraud is necessarily speculative and incapable of proof. These 137 write-in votes for the Clerks received from among the 6,936 employees eligible to vote in the election might very well have been induced by Pan American's letter to its employees during the first election requesting them to vote for the Clerks by so marking their ballots (R. 205), or by the enthusiasm of the Clerks' own members. In any event the Clerks had ample opportunity to correct any confusion before the ballots on the second election were mailed and it was their duty to do so. See *Linn v. United Plant Guard Workers*, 393 U. S. 53.

2. Fraud or no fraud, the 137 ballots in question were not counted for the Teamsters in determining its majority and at least indicate the desire of those so voting for representation by some union. That is all that is required under the decision of the court below in *Aeronautical Radio v. National Mediation Board*, 380 F. 2d 624, cert. den. 389 U. S. 912. See also *Railway Clerks v. Employees Ass'n.*, 380 U. S. 650.

3. Even if the 137 ballots were mistakenly cast because of "fraud", this would only have required the holding of a new election, not dismissal of the entire case.

IV.

The Clerks next argue that a number of the mail ballots were returned without postmarks and therefore should be disregarded and the Teamsters' application dismissed. The first answer to this contention is that even if the postmark were deemed necessary by technical Post Office regulations, it was not the fault of any party to this proceeding that the postmarks did not appear on some of the ballot envelopes which were returned. It is undenied that the ballots, whether postmarked or not, were at all times in the possession and custody of either the Post Office Department or the National Mediation Board. There is not a scintilla of evidence nor even a contention that any of the parties to the proceedings before the Board in any way tampered with these ballots. Certainly the purposes of the Act, as well as the interests of justice, would require that if any significance is to be attached to a lack of postmark, a new election should be held, not that the entire proceedings be dismissed and the employees left with no bargaining representative at all. However, no Board rule requires a postmark and the Board has determined that the absence of a postmark on certain envelopes is not cause for disallowance of such ballots. It is not unusual for bulk mail, especially during the Christmas season, to be delivered without a postmark. Certainly it is for the Board and not the courts to determine whether such ballots should be counted or not counted, absent anything in the Railway Labor Act to the contrary.

V.

The Clerks next argue that a number of write-in ballots were cast for the Transport Workers Union, who, under the no-raid provision of the AFL-CIO Constitution, could not challenge the Clerks in an election, and that therefore these votes should be discarded, leaving the

Teamsters with less than the required majority. The Teamsters are not a party to this no-raid provision, but even if they were, this private arrangement could not operate to prevent the Board from fulfilling its statutory duty to investigate representation disputes. Furthermore, it would be one thing if the TWU affirmatively sought certification from the Board against the Clerks (*United Textile Workers of America v. Textile Workers Union of America,* 258 F. 2d 743; *International Brotherhood of Firemen and Oilers v. International Association of Machinists,* 338 F. 2d 176), but it is quite another thing for the Board to give significance to the TWU's write-ins solely for the purpose of determining that the majority of the employees eligible to vote wanted to be represented by at least some union. This was the only reliance placed upon the TWU ballots by the Board. If the Teamsters' application were dismissed as requested by the Clerks, it would be a patent injustice to the Pan American employees involved, for it would to foreclose them from an opportunity to select any bargaining representative when it is obvious from this entire case that a vast majority of the employees do not wish to be without representation.

VI.

The Clerks' final argument is that changes since 1965 in the composition of the employees in the election unit destroy the 51% showing of interest required under the Board's rules. The Board has found the dispute a continuing one and there is nothing in the Railway Labor Act which imposes any time limit on showing of interest. It hardly behooves the Clerks, who by their litigation have endlessly prolonged this dispute, to assert an abuse of discretion.

CONCLUSION.

All the Clerks' contentions are fully answered in the opinion of the court below which found that there was neither an abuse of the Board's discretion nor a violation of the Railway Labor Act involved in the Board's decision to hold a third election. The Board's Decision, Findings and Order in respect to the objections to the second election and the reasons for directing another reflect its careful consideration of all the issues raised and the need for a third election (R. 18, 26). It is obvious from the record in this case that the employees of Pan American, as well as Braniff, want some union to represent them, and they should be given the opportunity to express their choice without further judicial proceedings and without further "dragging out of the controversy into other tribunals of law".

It is respectfully submitted that the petition herein should be denied.

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No. 363

In the Supreme Court of the United States

OCTOBER TERM, 1963

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, ET AL., PETITIONERS

v.

NATIONAL MEDIATION BOARD AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL MEDIATION BOARD AND ITS MEMBERS IN OPPOSITION

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BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, ET AL., PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL MEDIATION BOARD AND ITS MEMBERS IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the district court (Pet. App. 9a-35a) are unreported. The opinion of the court of appeals (Pet. App. 36a-51a), is not yet reported.

JURISDICTION

The decision of the court of appeals was rendered on June 28, 1968. The petition for a writ of certiorari

318-490—68

was filed on August 2, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly held that, in the circumstances of this case, the district court had no authority to enjoin the National Mediation Board from conducting representation elections.

STATEMENT

This case involves two separate representation disputes between an incumbent union, the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes ("Clerks' Union"), and a challenging union, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Teamsters' Union"). The employees involved are clerical, office and related employees of Pan American World Airways, Incorporated and Braniff International Airways, Incorporated. In two actions filed by the Clerks' Union, the district court granted preliminary injunctions enjoining the National Mediation Board from holding representation elections.

The court of appeals reversed, holding that "the complaint[s] should have been dismissed" (Pet. App. 38a).

A. *The Pan American Dispute*

The Clerks' Union has represented the Pan American employees involved here since 1946 (J.A. 6).[1] On

[1] "J.A." references are to the joint appendix in the court of appeals.

August 6, 1965, the Board received an application from the Teamsters Union alleging the existence of a representation dispute among these employees (J.A. 63, 101). After lengthy hearings and investigations to determine exactly which employees would be covered by subsequent proceedings, the Board, on June 30, 1966, ordered an election (J.A. 64, 66, 92, 98, 101, 102, 105, 106, 109). The Board honored the request of the Clerks' Union that its name be omitted from the ballot (J.A. 66–67, 118).

During the mail balloting, certain forged letters were sent urging the employees to write in the name of the Clerks' Union (J.A. 67).[2] Consequently, the Board impounded the ballots on September 7, 1966 (J.A. 68, 119), and sent the information it had to the Department of Justice and the Post Office Department for investigation and consideration of criminal action (J.A. 68).

After being informed that there would be no prejudice to the possibility of criminal action if the Board continued its investigation (J.A. 69, 120), the Board ordered a second election (J.A. 122). On November 10, 1966, the Clerks' Union brought an action to enjoin this second election on the ground that the prejudicial effects of the fraudulent first election had not been dispelled. The district court dismissed the case for lack of jurisdiction over the subject-matter, and the court of appeals affirmed. 374 F. 2d 269 (C.A.D.C.).

[2] The Clerks' Union believed that it would continue as the representative if the voting did not produce valid ballots from more than one-half of the eligible employees. Each valid write-in vote for the Clerks' Union undermined this position.

The second election ballot count began on December 27, 1966 (J.A. 72). The Clerks' Union raised numerous objections to rulings made at the counting (Pet. 24–28). The Teamsters' Union received eighty-seven percent of the valid ballots cast, but if some of the Clerks' Union's objections were allowed the number of persons who cast valid votes would be less than a majority of the eligible employees (J.A. 143–146).[3]

After considering these objections (J.A. 73), the Board on September 12, 1967, held that a third election was necessary to ascertain the clear choice of the employees. It determined that the employees' true choice could be most accurately determined if, unlike the ballot used in the first two elections, this ballot contained the names of both the Clerks' Union and the Teamsters' Union. The Board ruled that if the Clerks' Union did not wish its name on the ballot, it was to disclaim any interest in continuing to represent the employees. In denying the Clerks' Union's petition for reconsideration, the Board further amplified the reasons for its decision (J.A. 26–30).

The Clerks' Union filed this suit seeking: (1) a declaratory judgment that the Board must dismiss the Teamsters' Union's application on the basis of the Clerks' Union's challenges to the votes cast in the

[3] There were 6936 eligible voters. The Teamsters' Union received 3091 votes, the Transport Workers' Union 284, the Clerks' Union 137, and others 5. Thus, if the 137 write-in votes for the Clerks' Union were declared invalid, less than one-half of the eligible voters would have cast valid ballots for union representation.

second election;[4] (2) a declaratory judgment that no dispute existed due to the lack of proper authorization cards; (3) declaratory and injunctive relief prohibiting the Board from requiring the Clerks' Union's name to be placed on the ballot. The Clerks' Union filed a similar suit in the Braniff dispute.

B. *The Braniff Dispute*

Similar questions are presented by the dispute among the employees of Braniff International Airways. The group of employees involved is similar to that in the Pan American dispute. Here also the incumbent union is the Clerks' Union. The Teamsters' Union applied to the Board on May 4, 1967, alleging a representation dispute among certain Braniff employees (J.A. 240). The Clerks' Union again requested that its name be left off the ballot but asserted that it was not disclaiming its interest in continuing to represent the employees involved (J.A. 241). After notice and hearing (J.A. 244), the Board decided that the Clerks' Union must either be on the ballot or disclaim any interest in representing the employees (J.A. 30, 244).

ARGUMENT

In *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, this Court held that the district courts have no jurisdiction to review Board certifications in representation proceedings. That case involved solely

[4] This request for relief was in accordance with the Clerks' Union's view (J.A. 8) that it would remain certified if less than fifty percent of the eligible voters cast valid ballots.

a question of statutory construction, and the Court interpreted the Act as prohibiting review, stating (320 U.S. at 305):

> [T]he intent seems plain—the dispute was to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law.

This Court recently reaffirmed this principle in a case similar to the instant one. *Railway Clerks* v. *Employees Assn.*, 380 U.S. 650. The lower courts had enjoined the Board from holding an election without a "no union" space on the ballot, but this Court reversed on the authority of *Switchmen's Union*, stating (id. at 671):

> Unable to point to any specific requirement of a "no union" ballot in the Act, United and the Association are left to arguing in terms of policy and broad generalities as to what the Railway Labor Act should provide. The very nature of the argument indicates that the Board's choice of its proposed ballot is not subject to judicial review, for it was to avoid the haggling and delays of litigation that such questions were left to the Board. These are matters for Congress and the Board rather than the courts. Here the Board—a creature of Congress—has been, as we have said, careful to provide fair, yet effective procedures and we feel certain that it will continue to do so. If its decision on the ballot is not acceptable, the place to go is to Congress, not to us.

Although two exceptions to the nonreviewability of Board rulings in representation cases have been recognized, neither of them applies to this case. The exceptions are both narrow: (1) where the Board has acted beyond its "jurisdiction" and in "excess of its delegated powers and contrary to a specific prohibition in the Act" (see *Leedom* v. *Kyne*, 358 U.S. 184, 188; *Railway Clerks, supra*, 380 U.S. at 659–660), or (2) where the Board has failed to perform a duty or function which the Act imposes upon it (see *Railway Clerks, supra*, at 661). The Board has not exceeded its delegated powers, acted contrary to a specific statutory provision, or failed to perform a statutory duty by setting aside an election that it believes was unfairly conducted and ordering another one, and by requiring both unions to appear on the ballot.

The Clerks' Union argues (Pet. 25) that there is no "statutory authority to require the Clerks name to go on the ballot or to abandon representation rights." The Act, however, "empowers the Board to establish the rules governing elections," and "leaves the details to the broad discretion of the Board" (*Railway Clerks, supra*, 380 U.S. 668–669). The Board did not abuse its broad discretion in concluding that, in order to avoid the uncertainties that had characterized the two prior elections, both unions should have their names on the ballot so that the employees would have no difficulty in making an informed choice in voting. The Clerks' Union's theory that it can remain off the ballot but continue to represent the em-

ployees if less than one-half of them cast valid ballots, is contrary to the Board's practice under which an employee votes for no union by refraining from voting. See *Railway Clerks, supra,* 380 U.S. at 668–671. Under the Clerks' Union's theory, however, the failure to cast a valid ballot is not a vote for no representation but a vote for continued representation by that union. Thus, the absence of the Clerks' Union from the ballot in the second election meant that, as a practical matter, the Pan American employees were effectively denied their right to vote for no representation; such an election did not satisfy the statutory standards.

The Board similarly acted within its authority in ordering a third Pan American election. In the second election the Teamsters Union received 3091 votes out of a possible 6936, the Transport Workers Union received 284 write-in votes, the Clerks' Union received 137, and others received 5 (J.A. 143–146). Thus, 3517 employees, more than one-half of those eligible to vote, cast ballots in favor of union representation which were valid on their face. In view of the closeness of the results and the possibility that some of the employees might have been confused by the form of the ballot or by the earlier fraud, the Board was warranted in ordering a third election to attempt to determine more accurately the true desire of the employees. As the court below noted, "The Board can hardly be faulted for deciding to try again, particularly when the results were so close" (Pet. App. 43a). Moreover, since the results of the second Pan American election indicated that a majority of the

employees desired union representation, dismissal of the Teamsters' Union application would have been improper, because it would have constituted a determination that the employees did not want any union to represent them.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968